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NO. 13394

IN THE

United States Court of Appeals

For The Ninth Circuit

JOHN PALAKIKO, et al.,
Appellants,

vs.

JOE C. HARPER, Warden of
Oahu Prison,
Appellee.

Answering Brief of Appellee

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JURISDICTION

This is an appeal from a final judgment and order of the Supreme Court of the Territory of Hawaii denying relief and remanding appellants to custody in a habeas corpus case wherein appellants, John Palakiko and James Edward Majors, sought to set aside their conviction for a capital offense.[1]

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[1]The Judgment and Order is set forth in the Appendix, p. 71. This appeal is being prosecuted on the

Jurisdiction to review the judgment and order is conferred on this Court by 28 U.S.C. sec. 1293.

STATEMENT OF THE CASE

Since appellants' opening brief does not contain a statement of the case in the usual form, the appellee submits the following statement.

The appellants, John Palakiko and James Edward Majors, were tried and convicted of murder in the first degree and sentenced to death in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in Cr. No. 19955, *Territory of Hawaii* v. *John Palakiko and James Edward Majors*. The Supreme Court of Hawaii reviewed these convictions on writ of error and affirmed the judgment. *Territory* v. *Palakiko, et al.*, 38 Haw. 490. Appellants then appealed their convictions to this Court, which affirmed the judgment of the Supreme Court of Hawaii. *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th).

On September 7, 1951, the Governor of Hawaii executed death warrants for Palakiko and Majors.

Late the night before the day set for execution, Mary Palakiko, a sister of appellant Palakiko, presented a petition for a writ of habeas corpus to Justice

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original records of the Supreme Court of Hawaii, which have been transmitted to the clerk of this Court. There is no printed record. The order of this Court requires "that the parts of the original record pertinent to the contentions of the parties shall be added as appendices to their briefs." Order filed February 8, 1952. Accordingly, this brief is accompanied by an appendix containing portions of the record referred to in the brief.

Le Baron of the Supreme Court of Hawaii.[2] The Justice denied the petition but stayed execution and referred the petition to the full court. *Application of Palakiko and Majors*, 39 Haw. 141. The court then issued a writ of habeas corpus, to which the appellee made a return.[3] The appellants filed a traverse.[4] With issue thus joined the court then held what it described as "the lengthiest hearing in the history of this court" and upon such hearing denied relief and remanded the appellants to custody. *Application of Palakiko and Majors*, 39 Haw. 167. This appeal is taken from the judgment entered pursuant to the decision.

The appellants by their traverse in the habeas corpus proceeding attacked the validity of their convictions on the following grounds: (1) that they were secured by confessions involuntary in fact and in law; (2) that they were based on an unconstitutional statute; (3) that the appellants were denied assistance of counsel; and (4) that the appellants were unlawfully detained.[4A] During the hearing before the full court the appellants by amendment to the traverse alleged two additional grounds for relief, as follows: that the convictions were void because (5) the appellants were denied a fair trial in that they were tried and convicted in an atmosphere of public clamor for their conviction which made it impossible for them to obtain a fair and impartial grand and petit jury and a fair and impartial trial; and (6) that the general verdict of "guilty as charged" returned by the jury was inconsistent with the indictment, which contained three counts, in that two of the three counts

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[2]App. p. 1
[3]App. p. 11
[4]App. p. 35
[4A]App. p. 35

were "mutually exclusive", that one of the counts did not charge murder in the first degree, and that the evidence was insufficient to sustain a verdict of murder in the first degree on all three counts.[5]

Of the six contentions made by the appellants, two were questions purely of law. On the remaining four issues, oral testimony totalling 2,276 pages of transcript was received in addition to numerous exhibits. The complete record of the criminal prosecution was also made part of the record in this case. The materiality of some of the evidence might be disputed but the court, in pursuance of an express policy to afford the appellants every opportunity and latitude for proving their case, received evidence even remotely related to the issues, except in a few instances where admissibility was barred by some well-established rule of exclusion. For the purposes of this brief the evidence may be summarized under the following topics: A. The crime, B. Palakiko's confession to the murder of Mrs. Wilder, C. Majors' confessions to the murder of Mrs. Wilder, D. Assistance of counsel, and E. Alleged mob domination and denial of a fair trial.

A. The crime.

On March 10, 1948, appellants Palakiko and Majors escaped from a prison work gang in Honolulu.[6] Majors was then serving a sentence for second degree burglary[7] and Palakiko was serving a federal sentence for highway robbery in Oahu Prison.[8]

After leaving the work gang, the appellants fled

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[5]App. p. 68
[6]App. p. 73
[7]App. p. 31
[8]App. p. 74

into Nuuanu Valley and spent the night in the hills.[9] The following day, March 11, 1948, they worked their way back down the valley, entered the yard of Frank E. Midkiff and stole two raincoats and two bottles of citronella oil.[10] That evening they came upon the home of Mrs. Theresa Wilder, an elderly woman who lived alone,[11] ascertained she was by herself[12] and broke into the house.[13] Upon entry, they came upon Mrs. Wilder.[14] She ran towards the parlor door screaming. Palakiko grabbed and held her hands while Majors struck her on the mouth, knocking her false teeth out and felling her.[15]

After binding her feet and placing a towel over her mouth, they carried their victim into a bedroom and placed her on a bed.[16] While she was on the bed, Majors removed the woman's slacks and pulled her panties down.[17]

Majors made three separate statements concerning the crime. There is a variance in the statements as to whether he committed rape or attempted rape of Mrs. Wilder. In his first statement (March 21, 1948) Majors said he merely pulled down the woman's pants to see "if she no was too old, maybe I could use 'um, but she was too old."[18] However, prior to making his second statement Majors told detectives that "I fuck um",[19] and in his second statement (March 22, 1948) Majors admitted that he had sexual intercourse with

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[9]App. p. 77
[10]App. p. 78
[11]App. p. 79
[12]App. p. 81
[13]App. p. 82
[14]App. p. 86, see also n. 11, p. 78, and n. 13, p. 82
[15]App. p. 88
[16]App. p. 91
[17]App. p. 93
[18]App. p. 94
[19]App. p. 95

his victim.[20] Then in his third statement (March 24, 1948) Majors said that he masturbated, got on top of Mrs. Wilder and tried to spread her legs by using his knees but denied having intercourse.[21]

While Majors was on the bed with Mrs. Wilder, Palakiko entered the bedroom and struck her twice on the chin, and Majors struck her once.[22]

After the criminal attack, the appellants left the house, proceeded down the valley and spent the night under a house.[23]

The following evening, March 12, 1948, at 9:00 p.m. Palakiko was captured while attempting to steal a car[24] but Majors managed to escape and was not recaptured until March 21, 1948.[25]

Mrs. Wilder's body was discovered on March 16, 1948,[26] apparently in the same position that the appellants had left her on the evening of March 11. The body was partly disrobed and in a state of moderate decomposition. Her wrists and ankles were bound and her mouth was gagged. Her right eye was contused and there were abrasions on the left chin with a moderate amount of caked blood about her mouth, nose and on the pillow under her head. Her lower denture was still lying on her chest immediately below the chin. There were four distinct fractures of the lower jaw.[27]

B. Palakiko's confession to the murder of Mrs. Wilder.

Upon his recapture Palakiko was taken to the Hono-

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[20]App. p. 96
[21]App. p. 97
[22]App. p. 99
[23]App. p. 101
[24]App. p. 102
[25]App. p. 106, see also n. 76, p. 210
[26]App. p. 107
[27]App. p. 108

lulu police station[28] where he was held until March 17, 1948, when he was returned at 9:25 a.m. to Oahu Prison.[29]

While Palakiko was detained at the police station he was in a cell with three other prisoners[30] and he was questioned on two or three occasions, first, about a burglary at Kapena Lane to which he admitted guilt[31] and second, about an axe and his whereabouts during his escape.[32]

On March 18, 1948, a detective questioned Palakiko at Oahu Prison concerning a cigarette lighter for approximately fifteen or twenty minutes.[33]

At 5:00 p.m. on March 20, 1948, Palakiko was brought to the Honolulu Police Station[34] and taken to Captain Kennedy's office[35] where he was questioned by Captains Straus and Kennedy[36] for about thirty minutes regarding his whereabouts during his escape and about the raincoats which were stolen from the Midkiff home.[37] Straus and Kennedy left the office at approximately 5:30 p.m.[38]

The evidence is conflicting as to what happened during the next two hours, that is until 7:30 p.m.

Palakiko testified that when Straus and Kennedy left the office Detective King entered the room alone[39] and "busted me in the stomach about four times";[40] that a few seconds later Detective Stevens entered the

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[28]App. p. 102, n. 24
[29]App. p. 111
[30]App. p. 112
[31]App. p. 113
[32]App. p. 113, n. 31
[33]App. p. 116
[34]App. p. 117
[35]App. p. 118
[36]App. p. 119
[37]App. p. 119, n. 36
[38]App. p. 119, n. 36
[39]App. p. 121
[40]App. p. 121, n. 39

office and struck him on the left cheek,[41] whereupon he, Palakiko, hit his left eyebrow against the wall and his right eye against the corner of a map,[42] from which he received a cut over his left eye that bled[43] for several hours[44] and a cut over his right eye that did not bleed.[45] Palakiko admitted on cross-examination that he did not know of the cut over his right eye until he saw it in a newspaper picture of himself sometime later.[46] Palakiko further testified that after Stevens hit him in the office he was hauled to a "quiz room" where Stevens beat him in the "guts" for fifteen or twenty minutes,[47] until he said he would talk.[48] Palakiko said he was then returned to the Captain's office where a statement was taken from him commencing at 5:55 p.m.[49]

In support of Palakiko's testimony, his mother, two aunts and a sister testified that they saw him on March 22, 1948, and that he had a bloody cut over his left eye and also cuts over his right eye and on his left cheek, and that his face was swollen and black and blue.[50]

According to the police officers, however, when Straus left the office, Detectives King and Schneider entered the room together[51] and questioned Palakiko for about thirty minutes[52] regarding the raincoats and citronella oil[53] and King was never alone with Palakiko.[54] When Schneider and King finished questioning

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[41] App. p. 121, n. 39
[42] App. p. 121, n. 39
[43] App. p. 124
[44] App. p. 125
[45] App. p. 128
[46] App. p. 129
[47] App. p. 132
[48] App. p. 132, n. 47
[49] App. p. 133
[50] App. p. 134
[51] App. p. 156
[52] App. p. 158
[53] App. p. 159, see also n. 52, p. 158
[54] App. p. 160

Palakiko, Detective Stevens entered the office to guard Palakiko,[55] and remained alone with Palakiko for about five minutes.[56] Then Stevens opened the door and called in Straus,[57] whereupon Stevens left and Straus entered and remained in the office for thirty-five or forty minutes talking to Palakiko.[58] Straus then walked out, requested Kennedy and a reporter to join them, and in their presence Palakiko gave a statement commencing at 6:50 p.m. and concluding at 7:38 p.m.[59]

All of the police officers, prison guards and the acting public prosecutor who saw Palakiko on the evening of March 20, 1948, or shortly thereafter, testified that Palakiko was not subjected to any violence, coercion, threats or promises of immunity,[60] and none of these witnesses saw or noticed any cuts or wounds on Palakiko, nor did they notice anything unusual about his face.[61] Only one officer, Captain Kennedy, noticed any mark at all on Palakiko, which he described as a scar.[62]

Two newspaper photographers and a reporter who saw Palakiko on the evening of March 20th likewise noticed nothing unusual about his face and none saw any cuts, bruises or marks,[63] except newspaper photographer Ebert, who noticed over Palakiko's right eye "an old mark, scar or an old injury".[64]

After Palakiko made his statement, a photograph

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[55]App. p. 161
[56]App. p. 161, n. 55
[57]App. p. 162
[58]App. p. 164, see also n. 57, p. 162
[59]App. p. 165
[60]App. p. 167
[61]App. p. 172
[62]App. p. 188
[63]App. p. 190
[64]App. p. 192

of him was taken by police photographer Cunningham.[65]

A group of officers and Palakiko then went to the Wilder home where Palakiko completed his statement with a reenactment of the crime.[66] This statement at the Wilder home was made from 8:05 to 8:40 p.m.[67]

The group then returned to the police station[68] where several pictures of Palakiko were taken by newspaper photographers.[69]

The next morning, March 21, Palakiko was questioned from 11:58 a.m. to 12:03 p.m. by Captain Straus in the presence of acting public prosecutor Desha.[70] On March 21 Palakiko asked if he could see his family,[71] and the following day his mother,[72] two aunts[73] and a sister[74] called at the police station and saw Palakiko. Palakiko further testified that when he signed his confession, he did so freely and voluntarily.[75]

On the question of fact of the voluntariness of Palakiko's confession, the court below found Palakiko's testimony to be false and that the confession was not in any way coerced. *Application of Palakiko and Majors*, 39 Haw. 167, 176, 178.

C. Majors' confessions to the murder of Mrs. Wilder.

As soon as Palakiko confessed, implicating Majors, efforts to recapture Majors were intensified. Majors

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[65]App. p. 194
[66]App. p. 196
[67]App. p. 197
[68]App. p. 198
[69]App. p. 198
[70]App. p. 200
[71]App. p. 203
[72]App. p. 204
[73]App. p. 205
[74]App. p. 207
[75]App. p. 208

was recaptured at a roadblock at Kaneohe, a town about fifteen miles from Honolulu, shortly after midnight on March 21, 1948.[76] As he was being arrested he drank a bottle of iodine.[77] The arresting officer rushed Majors to a nearby emergency hospital in Kaneohe where his stomach was pumped out.[78] The investigating officers went to the hospital and there Captain Straus asked him a few questions.[79] Majors was thereafter transferred to Queen's Hospital in Honolulu[80] where he remained until March 24, 1948.[81]

Detective Stevens questioned Majors at Queen's Hospital for about one hour beginning at approximately 2:55 a.m. on March 21, 1948.[82] Later the same morning Stevens returned to the hospital and questioned Majors commencing at about 10:15.[83] Shortly thereafter, Captain Straus came to the hospital with a reporter, and a statement was taken from 10:45 a.m. to 11:30 a.m.[84] According to Dr. Rhead, the attending physician, Majors had been given four grains of phenobarbital at 4:30 a.m. March 21, 1948,[85] and his throat was burned by the iodine,[86] but he was physically and mentally capable of making a statement at 10:45 a.m. on March 21.[87]

The same evening, March 21, 1948, in the presence of Officer Donlin, who was on duty guarding Majors, Majors told Dr. Darrow, also of Queen's Hospital,[88] that he and Palakiko entered Mrs. Wilder's home, beat

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[76]App. p. 210
[77]App. p. 211
[78]App. p. 212
[79]App. p. 213
[80]App. p. 214
[81]App. p. 215
[82]App. p. 215
[83]App. p. 216
[84]App. p. 217
[85]App. p. 221
[86]App. p. 221
[87]App. p. 222
[88]App. p. 224

her, and left her bound and gagged on a bed.[89]

The following day, March 22, 1948, Detective Stevens and Officer Harris went to Queen's Hospital at about 1:45 p.m. to see Majors.[90] A preliminary conversation was had for about three quarters of an hour.[91] A reporter was called to the hospital and a second statement was given from 2:50 p.m. to 3:17 p.m.[92]

While Majors was at Queen's Hospital two of his sisters visited him on March 22, 1948.[93] They remained with Majors about thirty minutes.[94] The next day a third sister called at the hospital and saw Majors.[95]

On the morning of March 24, 1948, Majors asked a police officer at the hospital to call Captain Straus because he wanted to give Straus a statement.[96] Straus went to Queen's Hospital shortly before 9:00 a.m. and Majors informed him that "When we get down to the station I will tell you the truth."[97] Straus and Majors went to the Police Station where, with Palakiko present, Majors gave a third statement.[98] This statement was taken between 8:59 a.m. to 10:24 a.m.[99] Palakiko when asked during the questioning if Majors was telling the "right story", replied, "right story . . . yes."[100]

The third confession of Majors was presented to him for signature by Detective Edmondston on March 25, 1948.[101] Majors examined the statement, made sev-

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[89]App. p. 226
[90]App. p. 227
[91]App. p. 228
[92]App. p. 229
[93]App. p. 232
[94]App. p. 234
[95]App. p. 235
[96]App. p. 236
[97]App. p. 237
[98]App. p. 238
[99]App. p. 238, n. 98
[100]App. p. 240
[101]App. p. 240

eral corrections [102] and signed it.[103]

The two prisoners were returned to Oahu Prison on March 26, 1948.[104]

Majors admitted that at no time was he subjected to any violence[105] but asserted that he was tricked[106] and threatened by Stevens,[107] and that when given his transcribed statement for signing, Edmondston promised he would be charged with second degree murder.[108]

All such threats, promises and tricks were denied by the police officers, both in the criminal trial and at the habeas corpus hearing.[109]

As in the case of Palakiko's confession, the Supreme Court found that Majors' confessions were in fact given voluntarily. *Application of Palakiko and Majors*, 39 Haw. 167, 177-178.

D. Assistance of counsel.

Neither Majors nor Palakiko saw an attorney before giving their confessions, but there is no evidence that they requested counsel.

Palakiko's mother, father and sister retained Attorney T. S. Goo to represent Palakiko about two weeks after they saw him at the Police Station.[110] Majors' sisters retained Attorney Bert Kobayashi to represent Majors shortly after Majors left Queen's Hospital.[111] Sometime later Mr. George Kobayashi also became

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[102]App. p. 241
[103]App. p. 243
[104]App. p. 245
[105]App. p. 246
[106]App. p. 247, n. 107
[107]App. p. 247
[108]App. p. 250
[109]App. p. 251
[110]App. p. 275
[111]App. p. 280

associated as an attorney for the appellants.[112]

The attorneys thus retained in early April visited the two prisoners at Oahu Prison on at least three occasions.[113] Further opportunity for consultation with counsel was had in court on May 7, 1948, when appellants were arraigned,[114] and on June 3, 1948, when the trial court formally appointed the attorneys who had been previously retained by their relatives.[115] The formal appointment was made in order that they would be entitled to compensation out of the funds of the court.

On June 7, 1948, the attorneys for the defense stated to the court that they were ready for trial.[116]

Throughout the trial in the Circuit Court, on appeal to the Supreme Court and finally on appeal to this Court, Majors and Palakiko were represented by these same three attorneys. Appellants have admitted them to be competent.[117]

The Supreme Court found that appellants had timely and effective assistance of counsel. *Application of Palakiko and Majors*, 39 Haw. 167, 180-181.

E. Alleged mob domination and denial of a fair trial.

The murder of Mrs. Theresa Wilder attracted considerable public attention.[118]

The Chamber of Commerce offered a reward of $1,500 for the apprehension and conviction of the murderers of Mrs. Wilder.[119] The Board of Supervisors

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[112]App. p. 282, n. 113
[113]App. p. 282
[114]App. p. 284
[115]App. p. 285
[116]App. p. 286
[117]App. p. 287, see also 39 Haw. 167, 180-181
[118]Pet. Ex. 5, 6. Resp. Ex. A, B.
[119]App. p. 289

of the City and County of Honolulu likewise offered a reward.[120]

Upon their arrest, numerous newspaper articles described Palakiko and Majors as "killers" and "slayers".[121] The fact that the appellants had confessed to the murder of Mrs. Wilder was also reported by the press.[122]

Acting Public Prosecutor Desha announced publicly that the strongest charge that could be placed against the appellants was second degree murder.[123] Two attorneys, Mr. Hite and Mr. Steadman, urged the acting prosecutor to charge the prisoners with first degree murder.[124] The acting prosecutor refused.[125]

Mr. Hite and Mr. Steadman urged the Mayor to fill the office of Public Prosecutor for the City and County of Honolulu,[126] which had been vacant for ten months.[127] Subsequently, Mr. Hite was appointed Public Prosecutor.[128] He took Mr. Desha off the case[129] and assigned it to Mr. Hawkins.[130]

Mr. Desha testified that if he had defended the appellants he would have moved for a change of venue,[131] as he did not think they could have obtained a fair and impartial trial in the first circuit.[132]

On the other hand, Mr. Tavares and Mr. Cades, both of whom had been President of the Hawaii Bar Association, testified that they saw no reason why the appel-

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[120]App. p. 290
[121]Pet. Ex. 5, 6
[122]Pet. Ex. 5, 6
[123]App. p. 292
[124]App. p. 294
[125]App. p. 296
[126]App. p. 297
[127]App. p. 298
[128]App. p. 299
[129]App. p. 299
[130]App. p. 301, see also n. 129, p. 299
[131]App. p. 301
[132]App. p. 302

lants could not have obtained a fair trial in the Hawaiian courts or in the first circuit.[133] They both testified that there was no mob hysteria or similar feeling that would have prevented a fair trial.[134]

The attorneys for the appellants did not ask for a change of venue.

All prospective jurors were carefully examined by the attorneys for the defense and by the court.[135] There was no showing that any juror was in fact prejudiced by newspaper stories or by public opinion.

No evidence of any interference with the trial or intimidation of witnesses or the jury was offered at the habeas corpus hearing.

The confessions reported by the newspapers were duly introduced into evidence.[136]

On the question of a fair trial, the Supreme Court found that the claim of appellants was without merit. *Application of Palakiko and Majors*, 39 Haw. 167, 178-180.

SUMMARY OF ARGUMENT

The argument is opened with a consideration of the scope of the remedy of habeas corpus in the Territory of Hawaii. The question was raised at the very outset of this habeas corpus proceeding by appellee's contention that the issue of the voluntariness of appellants' confessions may not be relitigated, the issue having been raised and determined in the murder trial and the appeals from the conviction therein. It

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[133]App. p. 304
[134]App. p. 310
[135]App. p. 311
[136]Prosecution's Ex. 54, 55, 56, 57

is noted that the ruling of the court below limiting the scope of the remedy is in line with decisions of this Court and other courts of appeals. It is further submitted that the question is one of local law upon which this Court would not overrule the Supreme Court of Hawaii.

The ruling, however, was not given until after the hearing on the facts, which was indeed a very extended hearing. The next part of the argument is devoted to a review of the evidence adduced on the issue of coercion. It is shown that the findings of the court below rejecting the claim of coercion are sustained by the evidence and should not be disturbed.

The various other grounds asserted by appellants for reversal are then considered in order. The inapplicability of the *McNabb* rule (*McNabb* v. *United States*, 318 U.S. 332) to the instant case is demonstrated, both as a matter of law and of fact.

The constitutional rights to assistance of counsel and to a fair trial are next considered. It is shown that appellants did have the assistance of counsel at all stages of the proceedings at which they were entitled to such assistance and that there was no mob domination or any other interference with the trial such as to constitute a denial of the right to a fair trial.

It is followed by an examination of appellants' attacks on the constitutionality of the murder statute and the validity of the verdict of the jury, both of which are shown to be without merit, following which appellants' charges of suppression of evidence and use of perjured testimony by prosecuting authorities are refuted. Finally, after a reference to the rule that de-

fenses in criminal cases may not be reserved as grounds for collateral attack on the judgment, the remaining grounds urged by appellants are briefly considered and all shown to be likewise without merit.

It is concluded that the judgment should be affirmed.

ARGUMENT

I

THE ISSUE OF THE VOLUNTARINESS OF APPELLANTS' CONFESSIONS HAVING BEEN RAISED AND LITIGATED AT THE CRIMINAL TRIAL AND TO FINAL APPELLATE DETERMINATION, IT CANNOT BE RELITIGATED IN THIS HABEAS CORPUS PROCEEDING.

A. Scope of habeas corpus in Hawaii.

Writs of habeas corpus are issued by courts and judges of the Territory of Hawaii pursuant to sections 10351, 10352 and 10353 of the Revised Laws of Hawaii 1945. The pertinent portions of the statute read as follows:

> "*Sec. 10351. Writ, when issuable of right.* Every person restrained of his liberty, except in the cases mentioned in the following section, may prosecute a writ of habeas corpus as of right, according to the provisions of this chapter, to obtain relief from such restraint, if unlawful.
>
> "*Sec. 10352. Except in certain cases.* The following persons shall not be entitled, as of right, to demand and prosecute the writ:
>
> "1. Persons committed for felony, or for suspicion thereof, or as accessories before the fact, to a felony, when the cause is plainly and spe-

cially expressed in the warrant of commitment, unless when excessive and unreasonable bail is required.

"2. Persons convicted, or in execution upon legal process, civil or criminal.

"*Sec. 10353. Issuable by whom; when not of right.* The supreme court, the justices thereof and the circuit judges may in their discretion issue writs of habeas corpus in cases in which such writs are not demandable of right as well as in cases in which they are demandable of right."

The statute is obviously meager; it does little to define the scope or extent of the remedy; hence, the matter is left to judicial determination.

The principal defense of appellants Majors and Palakiko in their trial for murder was the contention that their confessions were involuntary. The contention was strenuously urged on writ of error to the Supreme Court of Hawaii, *Territory* v. *Palakiko et al.*, 38 Haw. 490, and again pressed on appeal to this Court, *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54. In view of those facts, at the outset of the habeas corpus proceeding appellee contended that the issue of the voluntariness of appellants' confessions could not be relitigated.[137] The court below nevertheless admitted evidence bearing on the issue, the taking of such evidence having in fact accounted for the greater part of the extended hearing. However, in its decision the Supreme Court of Hawaii ruled that having been represented by counsel at their criminal trial and the issue of coerced confessions having been raised and litigated in the trial and on appeal to final appellate

[137]App. p. 322

determination, appellants could not relitigate the issue in a habeas corpus proceeding. The court below stated on this point:

> "It is the settled general rule in this jurisdiction that a writ of habeas corpus cannot be used for the purposes of a writ of error or other mode of appellate review and that it does not lie to correct mere errors in the proceedings below, provided only that the court whose judgment or sentence is challenged has jurisdiction of the subject matter and of the person of the defendant. (*In re Abreu*, 27 Haw. 237; *In re Gamaya*, 25 Haw. 414; *In re Y. Anin*, 17 Haw. 338; *Ex Parte Smith*, 14 Haw. 245; *Ex Parte Fugihara Oriemon*, 13 Haw. 102; *In re Titcomb*, 9 Haw. 131; *In re Apuna*, 6 Haw. 732) . . . reasons in the form of exceptional circumstances, however, may permit habeas corpus to serve for an appeal. Such circumstances are ones 'where the need for the remedy afforded by the writ of habeas corpus is apparent.' (*Bowen* v. *Johnston*, 306 U.S. 19, 27) . . . But no need for the remedy afforded by the writ of habeas corpus exists where a defendant was represented by counsel and has litigated issues of coerced confessions to final determination in exhaustion of appellate remedy . . . A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies, as Palakiko and Majors did in this case, and then supersede those remedies on collateral attack, by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them.
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> ". . . As to those confessions, the case of Palakiko and Majors is merely one of relitigation and redetermination of issues already litigated to final appellate determination. This court finds

no occasion to redetermine those issues on habeas corpus, other than for the purpose of exposing the apparent attempt of the allegations of petition and traverse to clothe the case with a character which it does not have."

Application of Palakiko and Majors, 39 Haw. 167, 170-171, 173

B. Scope of remedy in federal jurisdictions.

The rule adopted by the Supreme Court of Hawaii in the instant case is in accord with all decisions of federal courts of appeals where that issue was considered. *Vermillion* v. *Zerbst*, 97 F.2d 347 (CA 5th); *Burall* v. *Johnson*, 134 F.2d 614 (CA 9th), cert. denied 319 U.S. 768; *Miller* v. *Hiatt*, 141 F.2d 690 (CA 3rd); *Cash* v. *Huff*, 142 F.2d 60 (CA 4th), cert. denied 323 U.S. 747; *Eury* v. *Huff*, 146 F.2d 17 (CA D.C.); *Smith* v. *United States*, 187 F.2d 192 (CA D.C.), cert. denied 341 U.S. 927; *Schramm* v. *Brady*, 129 F.2d 108 (CA 4th), cert. denied 317 U.S. 632; *Snell* v. *Mayo*, 173 F.2d 704 (CA 5th), cert. denied 338 U.S. 905. See also *Dorsey* v. *Gill*, 148 F.2d 857 (CA D.C.), cert. denied 325 U.S. 890.

The rule is well stated in *Burall* v. *Johnson*, 134 F.2d 614 (CA 9th), cert. denied 319 U.S. 768, thus:

"In February 1939, after a jury trial in which he was represented by counsel, appellant was convicted in a federal court in Illinois of a violation of the postal laws—assaulting a custodian and robbing the mails—and was sentenced to imprisonment for a period of twenty-five years. He petitioned the court below for a writ of habeas corpus, asserting that he had been denied due process in that he was convicted on the evidence of a confession secured from him by duress,

threats, and promises, being forced thereby to become a witness against himself. The petition was denied and the petitioner appeals.

"It appears on the face of the application that the court had jurisdiction of the person and of the offense charged. No appeal was taken from the judgment of conviction. This is not a situation where, as in Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L. Ed. 1302, a plea of guilty was induced by coercion. The writ of habeas corpus can not be used as a writ of review, or as a means of correcting error in the admission of evidence. Bowen v. Johnston, 306 U.S. 19, 23, 59 S.Ct. 442, 83 L. Ed. 455; Johnston v. Zerbst, 304 U.S. 458, 467, 58 S.Ct. 1019, 82 L.Ed. 1461; Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L. Ed. 1101, 21 Ann.Cas. 849; Vermillion v. Zerbst, 5 Cir., 97 F.2d 347. The time to inquire into the circumstances of the confession was during the progress of the trial, and error committed, if any, was subject to correction on appeal."

134 F.2d 614

However, appellants cite several federal cases as authority that habeas corpus may be resorted to for relief from convictions obtained with coerced confessions. (Op. Br., p. 141) Of the cases so cited, *Waley* v. *Johnston*, 139 F.2d 117 (CA 9th), and *Decatur* v. *Hiatt*, 184 F.2d 719 (CA 5th), are not at all in point, as they involved allegedly coerced pleas of guilty. In the other federal cases cited, *Smith* v. *Lawrence*, 128 F.2d 822 (CA 5th), *Sedorko* v. *Hudspeth*, 109 F.2d 475 (CA 10th), *Sharpe* v. *Commonwealth of Kentucky*, 142 F.2d 213 (CA 6th), and *Maye* v. *Pescor*, 162 F.2d 641 (CA 8th), the district courts apparently did hear evidence regarding the voluntariness of con-

fessions but in each instance found the confessions to be voluntary, as did the court below in the instant case. But in those cases the question of the scope of the remedy apparently was not called to the attention of the district court or urged on appeal. In any event, relief was denied.

Neither is *Lisenba* v. *California*, 314 U.S. 219, also cited by appellants (Op. Br. p. 138), authority for the contention urged by the appellants that they are entitled to habeas corpus relief on the ground that their confessions were involuntary. There, both a criminal case and a habeas corpus case were before the Supreme Court at the same time. In the habeas corpus case (case No. 5), the contention was that the prosecution used perjured testimony to obtain the conviction, while the question of the voluntariness of the confession was an issue in case No. 4, which was a direct attack on the conviction.[138]

One other case merits consideration in this connection. In *Jennings* v. *Illinois*, 342 U.S. 104, it was alleged that coerced confessions were used to obtain convictions and that the petitioners were unable to have their convictions reviewed by writ of error. The court held that if the allegations were true and if their claims had not been waived at or after trial, petitioners were in custody in violation of federal constitutional rights. However, footnote 9 of the Court's opinion on page 110 and Mr. Justice Frankfurter's dissent at pages 113 and 114 indicate that if the claim could have been raised in the criminal trial and reviewed upon direct review, but had not been, no substantial federal question would have been present.

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[138]314 U.S. 219, 222

On remand of the *Jennings* case to the Supreme Court of Illinois, the Illinois court in further remanding the case to the trial court and directing the trial court to hear evidence regarding the voluntariness of the petitioners' confessions, *People* v. *Jennings*, 411 Ill. 21, 102 N.E.2d 824, stated:

> ". . . Of course, as held in People v. Dale, 406 Ill. 238, 92 N.E.2d 761, constitutional issues which have been determined on the merits by this court are not available upon a post-conviction hearing.
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> . . .
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> "If the trial court finds, on hearing, that petitioners had counsel of their own choosing or competent counsel appointed by the court and that they were not prevented from asserting their claims, the claims have been waived and that will be the end of the matter so far as the trial court is concerned. The claims will also have been waived unless the trial court finds that petitioners were prevented by their indigence from obtaining a review by writ of error accompanied by a bill of exceptions."
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> 102 N.E.2d 824, 826, 827

As pointed out earlier in this brief, appellants were represented by counsel at their trial[139] and the claim that their confessions were coerced was in fact asserted[140] and pressed upon appeal to the Supreme Court of Hawaii and further to this Court.

Certainly there was no denial of fundamental fairness that would warrant further litigation of the same issue. *Smith* v. *United States*, 187 F.2d 192. If

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[139]Ans. Br. pp. 13-14

[140]Ans. Br. pp. 19-21

criminal justice is to be administered there must be a reasonable end to litigation.

The question of the scope of the remedy under territorial law is obviously a question of local law. It does not raise a federal question, as was recognized by the Supreme Court in *Jennings* v. *Illinois*, 342 U.S. 104, where it was left to the courts of Illinois to make a final determination of the extent of relief available under the Illinois Post Conviction Hearing Act. The reason is that the scope of habeas corpus relief is a procedural question separate and apart from the question of whether constitutional rights were infringed at the prisoner's trial.

It is submitted that the ruling of the Supreme Court of Hawaii limiting the scope of the writ in this jurisdiction is practically conclusive. On a point so well supported by federal cases, including decisions of this Court, it is unthinkable that the Supreme Court of Hawaii would be overruled by this Court. *Waialua Co.* v. *Christian*, 305 U.S. 91; *Pioneer Mill Co.* v. *Victoria Ward*, 158 F.2d 122 (CA 9th), cert. denied 330 U.S. 838; *Meyer* v. *Territory of Hawaii*, 164 F.2d 845 (CA 9th), cert. denied 333 U.S. 860; *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th).

II

THE COURT BELOW HAVING FOUND AFTER HEARING AND ON SUBSTANTIAL EVIDENCE THAT THE CONFESSIONS WERE IN FACT MADE VOLUNTARILY, THIS COURT SHOULD NOT SET ASIDE THE FINDING.

As pointed out in the preceding portion of this brief (page 19), the rule limiting the scope of habeas

corpus was not adopted until after the close of the hearing. This is not a case where relief was denied without a hearing on the facts. There was indeed a very lengthy hearing, in which appellants were afforded every opportunity to prove that their confessions were involuntary.

A. Palakiko's confession.

The testimony bearing on the question of coercion as to Palakiko's confession is summarized in the statement of the case, pages 6 to 10 of this brief.

In support of the contention that his confession was coerced, Palakiko testified that both Detective King and Detective Stevens struck him before he confessed.[141] King resigned from the department and left the Territory before the murder trial and was not available at either the murder trial or the habeas corpus proceeding.[142] Stevens testified in the criminal trial but later resigned from the department and left the Territory and was not available at the time of the habeas corpus hearing.[143]

Palakiko's testimony that King struck him was directly contradicted by Detective Schneider, who testified that he was with King when King saw Palakiko, that King was never alone with Palakiko and that neither he nor King coerced Palakiko in any manner.[144] Also, in his testimony at the murder trial, which was incorporated as part of the evidence in this case, Stevens flatly denied striking Palakiko or coercing him in any manner.[145].

However, there was more to the matter than a mere

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[141]App. pp. 121, 132, n. 39, 47
[142]App. p. 324
[143]App. p. 325
[144]App. p. 326
[145]App. p. 328

assertion by one witness and a denial by another. Testimony was given by Palakiko's mother, two aunts and a sister, all of whom testified that they saw him on March 22nd, two days after he was allegedly beaten.[146] Prior to the hearing, Palakiko and his relatives filed affidavits in which they stated that Palakiko's face was bruised and swollen and that he had a plaster on his forehead, a bloody cut over his left eye and a cut on his left cheek, but none of them mentioned a wound over his right eye.[147]

Before Palakiko and his relatives testified, several photographs taken of him a few hours after the alleged beating were introduced into evidence by appellants.[148] These photographs clearly show that Palakiko did not have any kind of an injury over his left eye. The only mark which appears in the photographs is one over his right eye.

When confronted with the photographs and their affidavits on cross-examination, Palakiko's relatives became understandably confused and vague in regard to the existence, number and location of the alleged wounds on Palakiko's face.[149] However, Palakiko was positive in his testimony that he received a cut over his left eye that bled for several hours[150] and that he also had a cut over his right eye,[151] but admitted that he did not know of the existence of the cut over his right eye until he saw his picture in a newspaper sometime after the alleged beating.[152]

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[146]App. pp. 204, 205, 207, n. 72, 73, 74

[147]App. pp. 7, 52, 62, 64, 65, 67

[148]Pet. Ex. 7, 8, 9, 10, 11, 12

[149]App. p. 134, n. 50

[150]App. pp. 124, 125, n. 43, 44

[151]App. pp. 128, 129, n. 45, 46

[152]App. p. 129, n. 46

None of the twelve police officers, two prison guards, two newspaper photographers, a newspaper reporter or the acting public prosecutor who saw Palakiko shortly after the alleged beating noticed or saw any cuts, bruises or anything unusual about Palakiko's face,[153] except Captain Kennedy of the police and Mr. Ebert, a newspaper photographer. Kennedy recalled that he noticed the mark over Palakiko's right eye when Palakiko arrived at the police station prior to the alleged beating. He described the mark as a "scar".[154] Mr. Ebert, a former clinical photographer for the Harvard Medical School, testified that he noticed the mark over Palakiko's right eye on the evening of March 20, 1948, after the alleged beating, which he described as an old injury that was "healing".[155]

Confronted with this conflict in the evidence as to whether or not Palakiko was subjected to violence and coercion the Supreme Court determined the facts to be that Palakiko was not subjected to any force, coercion or violence.[156]

B. Majors' confessions.

Majors also claimed coercion by Detective Stevens, who questioned Majors on the first and second of the three occasions that he made a recorded statement to the police. The circumstances surrounding the three statements are related in the statement of the case at pages 10 to 13 and will not be repeated here. More particularly on the charge of coercion, Majors

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[153]App. pp. 172, 190, 192, n. 61, 63, 64

[154]App. p. 188, n. 62

[155]App. p. 192, n. 64

[156]39 Haw. 167, 176, 178

testified that he told Stevens he was sick, his throat hurt and he didn't want to answer questions;[157] that it seemed to him that Stevens was there all the time;[158] and that Stevens told him: (a) ". . . I might as well tell him everything because I was going to die anyway";[159] (b) ". . . when I got out of the hospital he would like to get me in a room";[160] (c) ". . . I might as well confess now since Palakiko implicated me . . .", and (after showing him a newspaper story of Palakiko's confession) ". . . you going to be charged whether you say it or not";[161] and that (d) ". . . if I tell everything, it be easy for me."[162] Majors admitted, however, that he was at no time subjected to violence.[163]

In the criminal trial Majors' attorneys attacked the admissibility of his statements on practically the same grounds. Although Majors did not testify in the criminal trial, his third statement contained practically the same charges and furnished the basis for a rigorous cross-examination of Detective Stevens,[164] who did testify at the trial. The trial court also questioned Stevens closely on the question of coercion.[165] Stevens' testimony in regard to the voluntariness of Majors' confessions at Queen's Hospital was in summary as follows: That he questioned Majors on three occasions, first, at 2:55 a.m. on March 21, 1948, for about an hour, at which time no recorded statement was taken; second, from about 10:15 the same morning to 11:30 a.m., at which time a recorded statement

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[157]App. p. 330
[158]App. p. 331
[159]App. p. 331
[160]App. p. 247, n. 107
[161]App. p. 247, n. 107
[162]App. p. 247, n. 107
[163]App. p. 246, n. 105
[164]App. p. 332, n. 166
[165]App. p. 332, n. 166

was taken; and third and last, on March 22, 1948, from 1:45 p.m. to 3:17 p.m., when a second recorded statement was taken; that Majors did not ask to be left alone or tell him that he didn't want to talk, but on the contrary Majors was cooperative; and that he did not at any time subject Majors to violence or threats of violence, or offer any reward or promise immunity to Majors. Stevens specifically denied telling Majors that "it would go easy with him if he came out and talked", that "it would make no difference what he said he would still be charged", or that he would like to take him or get him in a room.[166]

The testimony of two other witnesses, Dr. Rhead of Queen's Hospital and Officer Donlin, is important in connection with Majors' confessions. The testimony of Dr. Rhead, who testified in the criminal trial, showed that Majors was physically and mentally capable of making a statement on the morning of March 21, 1948.[167] The testimony in the habeas corpus proceeding of Officer Donlin that Majors on March 21, 1948 told Dr. Darrow, also of Queen's Hospital, in his presence the details of the attack on Mrs. Wilder clearly indicates Majors' willingness and ability to confess.[168]

It might be noted at this point that this Court in *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th), found no objection to informing a prisoner that he would be charged whether he said "yes" or "no" or to inform a prisoner that "if he speaks it will be easier for him".

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[166]App. p. 332

[167]App. p. 222, n. 87

[168]App. pp. 224, 226, n. 88, 89

In regard to Majors' testimony that Stevens told him he might as well tell him everything because he was going to die, it is clear that such a statement does not invalidate a confession. As the influence of religious considerations makes for truth in a confession and not against it, confessions given under such influence are held to be admissible. 3 Wigmore, Evidence, § 840, (3d Ed.).

The fact that Majors was shown a newspaper report of his accomplice's confession does not render Majors' confessions involuntary even though it might have been done to induce Majors to confess. Confessions are admissible even though induced by false reports of an accomplice's confession. 3 Wigmore, Evidence, § 841, (3d Ed.). Even a confession obtained by fraud or trick is held to be admissible unless the fraud or trick is such as would tend to produce a false statement. 3 Wigmore, Evidence, § 841, (3d Ed.).

Besides the two confessions to Stevens, Majors gave the police a third confession on March 24, 1948. As to this confession, Majors testified that he asked an officer to call Captain Straus and to give him a message, "That I wanted to see Captain Straus, to take me out of the hospital" "So I can give him my own story",[169] "a straight story".[170] Majors asserts two reasons for making the third confession. First, he claimed that he gave Straus the third confession to avoid being beaten up;[171] yet he had already given two statements to Stevens and Stevens had reminded

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[169]App. p. 236, n. 96
[170]App. p. 338
[171]App. p. 338

him of these statements.[172] Second, he said that he didn't know if what he had told Stevens was right or wrong and wanted to tell Straus the truth.[173] The only apparent reason for making the third confession was that he might include self-serving declarations repudiating his previous confession of raping Mrs. Wilder.

Majors explains his signing the confession of March 24, by his testimony that he didn't read his confession[174] and signed it only because Detective Edmondston told him he would be charged with second degree murder.[175] Edmondston denied making any such promise or assertion to Majors.[176] Majors' denial of reading the confession is inconsistent with his admission that he made corrections on pages 2, 12, 24 and 28 of the confession.[177]

The Supreme Court concluded as to Majors' testimony regarding his confessions that ". . . the testimony of Majors on the issues of coerced confessions is not credible . . ." *Application of Palakiko and Majors*, 39 Haw. 167, 177.

The appellants in their opening brief (pages 89-90) urge that the testimony of Captain Kennedy completely confirms Majors' description of how his statements were obtained. Captain Kennedy when being questioned by the appellants' attorney was shown a newspaper and was asked if he made the statement contained in an article there. Kennedy said that offhand it appeared to be the gist of what was released

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[172]App. p. 338, n. 170, 173

[173]App. p. 338, see also n. 98, p. 238

[174]App. p. 339

[175]App. p. 250, n. 108

[176]App. p. 251, n. 109

[177]App. p. 241, n. 102

over Saturday and Sunday (March 20 and 21, 1948). When asked if the statements in the article appeared to be the ones he made and to be true Kennedy replied, "that is correct".[178] The newspaper article referred to in the questioning reported that detectives questioned Majors from 3:00 a.m. to 6:30 a.m. on March 21, 1948, that Majors was not given a sedative until 6:30 a.m. and that detectives were working in relays.[179] The statements in this article are clearly erroneous. The hospital records, Pet. Ex. 3, p. 10, Sleep Chart and Sheet 1 of the Nurse's Record, p. 14 of the same exhibit, show that Majors was given sodium luminal (phenobarbital) at 4:30 a.m., and that he went to sleep long before 6:30 a.m.[180]

C. Effect of findings by court below.

The Supreme Court of Hawaii examined Palakiko's face, observed the demeanor of the witnesses, determined the credibility of the witnesses, and after weighing the evidence, found the facts to be that the testimony of Palakiko and Majors was not credible, that Detectives King and Stevens did not strike, threaten or coerce Palakiko and that Stevens did not threaten or coerce Majors.

> "On review of the entire record of hearing and trial, this court further finds that there was no force, violence, duress, threats, misrepresentations or promises of immunity or reward made to obtain the confessions of either Palakiko or Majors and *a fortiori* no concealment thereof at the trial. It also finds that the confessions were made voluntarily consonant to constitutional

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[178]App. p. 340

[179]Pet. Ex. 6, *Honolulu Advertiser*, March 22, 1948, p. 4

[180]App. p. 342

> guarantees. Nor is there any indication that the testimony, on which the confessions were determined to be voluntary at the trial, is perjured and discovered to be such after trial so as not to have been open to consideration or reviewed on appeal. On the contrary, the hearing conclusively establishes such trial testimony to be credible, substantial and sufficient to warrant the admission of the confessions into evidence as the basis for conviction as determined on appellate review." *Application of Palakiko and Majors*, 39 Haw. 167, 178

This Court when considering a case involving questions of due process from the Supreme Court of Hawaii examines the record in like manner as the Supreme Court of the United States when reviewing judgments of state courts. *Palakiko* v. *Territory*, 188 F.2d 54, 56 (CA 9th).

The rule on such review is stated in *Watts* v. *Indiana*, 338 U.S. 49, as follows:

> "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. . . .
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> "In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore

> only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevent to the constitutional issue here. . . ."
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> 338 U.S. 49, 50, 51-52

At the very least, findings of fact by the Supreme Court of Hawaii supported by evidence will not be overturned by this Court in the absence of manifest error. *Waialua Co.* v. *Christian*, 305 U.S. 91; *Reyes* v. *La Capital De Puerto Rico*, 106 F.2d 199 (CA 1st); *Ramu* v. *Succession of Verges*, 42 F.2d 976 (CA 1st); *Pioneer Mill Co.* v. *Victoria Ward*, 158 F.2d 122 (CA 9th), cert. denied 330 U.S. 838.

If the findings of the court below would not be set aside even upon direct attack on the judgment in the criminal case, then certainly they shouldn't be disturbed upon a collateral attack in a habeas corpus proceeding.

III

THE MCNABB RULE IS INAPPLICABLE AS A MATTER OF LAW AS WELL AS OF FACT.

The appellants further contend that regardless of whether or not there was coercion in fact, their confessions were inadmissible because they were obtained under circumstances which rendered them involuntary as a matter of law, citing the rule of the *McNabb* case, *McNabb* v. *United States*, 318 U.S. 332.

The *McNabb* rule, as laid out in *McNabb* v. *United States*, 318 U.S. 332, *United States* v. *Mitchell*, 322 U.S. 65 and *Upshaw* v. *United States*, 335 U.S. 410, is to the effect that a confession made during a period of detention which is in violation of the federal statute

requiring that prisoners be taken promptly before a committing magistrate is inadmissible, regardless of whether or not the confession was the result of actual coercion. Adopted under the power of the Supreme Court to establish rules determining the admissibility of evidence in federal criminal cases and Rule 5 of the Federal Rules of Criminal Procedure, it is simply a federal rule of evidence, not a principle of constitutional law, and does not apply to state criminal proceedings. *Gallegos* v. *Nebraska*, 342 U.S. 55.

Federal rules of evidence do not apply to the courts of the Territory of Hawaii. *Palakiko* v. *Territory*, 188 F.2d 54. Hence, the *McNabb* rule is clearly inapplicable in the instant case.

Moreover, even in federal jurisdictions, where the rule applies, it is held that a violation of the rule is not grounds for habeas corpus relief. Thus, in *Smith* v. *United States*, 187 F.2d 192 (CA D.C.), cert. denied 341 U.S. 927, the petitioner had been arrested by the District of Columbia police and unlawfully detained for thirteen days and the statements he had made to the police in the course of questioning during such detention had been used against him in the criminal trial. The court held that though the admission of the evidence had been erroneous, having been contrary to the *McNabb* rule, the convictions could not be collaterally attacked by habeas corpus, and stated:

> "When, as in Bowen v. Johnston, supra, it is said that there has been a denial of 'constitutional rights,' (see, to similar effect, Smith v. O'Grady, supra), the whole course of events is to be considered, not merely the erroneous admission of evidence claimed to infringe a right protected by the Constitution. Such admission alone does

> not result in the denial of a constitutional guaranty so long as the error is subject to correction on appeal and there is no indication of any deterrent to appeal, such as lack of counsel. Accordingly, in such circumstances the method of correction must be direct, not collateral. Otherwise a motion under § 2255 becomes indeed a substitute for the regular judicial process of trial and review. Where, however, the denial of constitutional right persists, through lack of counsel or perjury undiscovered, or mob domination which saps all substance from the trial, or there is lack of jurisdiction or some other fundamental weakness in the judicial process which has resulted in the conviction, collateral attack is at hand, now under § 2255. For, ordinarily, appeal would be ineffective to preserve the right denied. This is not the situation in the case at bar. Appellant had full opportunity to attack on his trial the evidence now challenged and to appeal on the basis of its erroneous admission if he so desired."
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> 187 F.2d 192, 197-198

Even if it is assumed that the *McNabb* rule applies in this jurisdiction, it will be found that there was no violation of the rule. It will be recalled that both appellants were recaptured convicts at the time they were questioned and their confessions obtained.[181] It is absurd to talk of "illegal detention" of escaped convicts. A similar situation was covered in *United States* v. *Carignan*, 342 U.S. 36, where the Court declined to extend the *McNabb* rule to statements concerning other crimes made by prisoners who are legally under detention on criminal charges.

It is respectfully submitted that appellants' reliance on the *McNabb* rule is entirely without substance.

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[181] App. pp. 73, 31, 74, n. 6, 7, 8

IV

THE APPELLANTS HAD THE ASSISTANCE OF COUNSEL AT ALL STAGES OF THE PROCEEDINGS AT WHICH THEY WERE CONSTITUTIONALLY ENTITLED TO SUCH ASSISTANCE.

Appellants contend (Op. Br. pp. 159-160) that they were deprived of their constitutional right to assistance of counsel (1) because they did not have the assistance of counsel while under investigation by the police, (2) because they were not accorded a preliminary hearing, and (3) because their counsel did not have adequate time to consult and prepare for trial.

The Sixth Amendment to the United States Constitution provides that "*In all criminal prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." (Emphasis added) It was said in *Powell* v. *Alabama*, 287 U.S. 45 at page 69, that a defendant ". . . requires the guiding hand of counsel at every step in the proceedings against him." The basic doctrine of the *Powell* case, however, was that counsel must have time prior to trial to prepare the defense; the broad language of the opinion must be considered in the light of later decisions. Thus, it is held that the Sixth Amendment does not require that the accused be represented by counsel on arraignment if he pleads not guilty, as the absence of counsel at such time could not prejudice the defendant. *Council* v. *Clemmer*, 177 F.2d 22 (CA D.C.), cert. denied 338 U.S. 880; *Wilfong* v. *Johnston*, 156 F.2d 507 (CA 9th). Even if the accused pleads guilty, the lack of counsel at arraignment is not prejudicial if counsel is afterwards appointed and an opportu-

nity is had to withdraw the plea. *Council* v. *Clemmer*, *supra*. Nor is there any constitutional requirement that the accused be represented by counsel at a preliminary hearing. *Burall* v. *Johnston*, 146 F.2d 230 (CA 9th), cert. denied 325 U.S. 887; *Price* v. *Johnston*, 144 F.2d 260 (CA 9th), cert. denied 323 U.S. 789. Moreover, a preliminary hearing is not a *criminal prosecution* within the meaning of the Sixth Amendment. *Burall* v. *Johnston*, *supra*; *Garrison* v. *Johnson*, 104 F.2d 128 (CA 9th), cert. denied 308 U.S. 553; *Council* v. *Clemmer*, *supra*. *Wood* v. *United States*, 128 F.2d 265 (CA D.C.), cited in the opening brief at page 157, is not to the contrary; it merely held that a plea of guilty, made at a preliminary hearing where the defendant did not have assistance of counsel, is not admissible in evidence against the defendant in the trial.

An investigation by the police is certainly not a *criminal prosecution* within the meaning of the Sixth Amendment. Therefore, the claim that appellants' constitutional right to assistance of counsel was infringed because they were not provided with counsel before they confessed is without merit. Whether an accused consults with counsel prior to making a confession is merely one of the factors which may be considered in determining the voluntariness or admissibility of a confession, and it is generally held that the fact that a defendant did not have the advice of counsel prior to making a confession does not affect the admissibility of his confession. *Wilson* v. *United States*, 162 U.S. 613; *State* v. *Bunk*, 4 N.J. 461, 73 A.2d 249; *State* v. *Hofer*, 238 Iowa 820, 28 N.W. 2d 475; *State* v. *Watson*, 114 Vt. 543, 49 A.2d 174; *State* v. *Tillett*, 233 S.W.2d 690 (unreported in Mo.

rpts.); *State* v. *Henderson*, 182 Ore. 147, 184 P.2d 392; *Territory* v. *Chung Nung*, 21 Haw. 214. See also *Gallegos* v. *Nebraska*, 342 U.S. 55.

The contention that appellants were denied their constitutional right to assistance of counsel because they did not have a preliminary hearing is likewise without merit. There is no constitutional right to a preliminary hearing. *Burall* v. *Johnston*, 146 F. 2d 230 (CA 9th), cert. denied 325 U.S. 887; *Council* v. *Clemmer*, 177 F.2d 22 (CA D.C.), cert. denied 338 U.S. 880; *Garrison* v. *Johnston*, 104 F.2d 128 (CA 9th), cert. denied 308 U.S. 553. In *Burall* v. *Johnston*, this court said:

> "The appellant states that he was taken before the Commissioner after his arrest, that 'petitioner then demanded counsel to represent him, but instead of counsel he was told to plead; he plead not guilty, he was remanded to jail.' He herein insists that he was entitled to have counsel assigned to assist him in the hearing before the Commissioner without cost, and he now contends that because of this the court had no jurisdiction to try him upon the indictment subsquently returned.
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> "The preliminary hearing is not a trial within the meaning of the Constitution but is an ex parte proceeding. In fact, this court has held that the accused is not entitled to the issuance of a writ because he had no preliminary examination. Garrison v. Johnston, 9 Cir., 104 F.2d 128, 130. See also Clarke v. Huff, 73 App. D.C., 351, 119 F. 2d 204.
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> 146 F.2d 230

Neither appellants nor their counsel, who were retained by relatives soon after their arrest, made any request for a preliminary hearing. Regardless of what

would have been shown in a preliminary hearing, appellants were, of course, not eligible to be released, for they were serving prison sentences.

As to the contention that their former counsel did not have sufficient opportunity to prepare the defense —as a matter of fact, appellants' relatives retained counsel for them early in April, 1948, about two months prior to the trial.[182] The attorneys so selected visited the prisoners at Oahu Prison on at least three occasions, the first on April 8, 1948.[183] Besides the consultations at Oahu Prison, opportunity for further consultation with counsel was had on May 7, 1948, when the appellants were arraigned, and on June 3, 1948, when the trial court formally appointed the previously retained counsel, and on the same day a plea of "not guilty" was entered and the case set for trial on June 7, 1948 without objection.[184] On the day set for trial, the attorneys for the defense appeared and answered that they were ready for trial.[185] Throughout the trial in the circuit court, on appeal to the Supreme Court of Hawaii and finally on appeal to this Court, the appellants were represented by the same three attorneys,[186] who the appellants admitted were competent and that their competency was not in issue.[187] It is, therefore, clear that there was no denial of the right to assistance of counsel.

The following quotation from *Wilfong* v. *Johnston*, 156 F.2d 507 (CA 9th), where consultation on "at

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[182]App. pp. 275, 280, n. 110, 111

[183]App. p. 282, n. 113

[184]App. pp. 284, 285, n. 114, 115

[185]App. p. 286, n. 116

[186]39 Haw. 167, 170, 180-181

[187]App. p. 287, n. 117

least two occasions" prior to trial was found to be sufficient, is appropriate in this connection:

> "We find no merit in the contention of petitioner that he was moved to another district during the pendency of his trial for the reason that he had opportunity to consult with counsel during that time and we fail to discern wherein he was thereby prejudiced in any manner, nor did the failure to permit petitioner to be represented by counsel at the time of arraignment result in prejudice to him. While it is true that one charged with crime 'requires the guiding hand of counsel at every stage in the proceedings against him' and where such failure occurs it will be carefully scrutinized, yet the fundamental purpose of the law in requiring such assistance is to insure against the prejudicing and hampering a defendant in his defense of a charge against him. Such careful scrutiny is especially necessary where a plea of guilty is entered. In the instant proceeding the situation is quite different; a plea of not guilty was entered for the defendant; before trial he secured counsel of his own choice, had an opportunity to confer with such counsel, and before trial additional counsel was secured with whom it must be assumed petitioner also had opportunity to confer. . . ."
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> 156 F.2d 507, 508-509

Furthermore, there is no evidence that counsel would have been able to defend the appellants more effectively had they consulted with them on more occasions, or had they asked for more time to prepare the defense.[188] In the absence of such evidence it cannot possibly be said that effective assistance of counsel was denied. *United States* v. *Wight*, 176 F.2d 376 (CA 2d); *State* v. *Zied*, 116 N.J.L. 234, 183 Atl. 210.

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[188]39 Haw. 167, 178

Although the appellants do not directly allege it, they argue by innuendo that their former defense counsel were incompetent, in that they did not know that the appellants could have testified in the murder trial solely on the issue of the voluntariness of the confessions[189] and in that counsel did not attack the confessions except by cross-examination.[190] The charge is entirely unwarranted and it is entirely inconsistent with the admission of their competency. On the contrary, the Supreme Court of Hawaii stated:

> "...They [defense counsel] followed a course of procedure at the trial, which they determined to be for the best interests of the defense of Palakiko and Majors, by not placing either one of them on the witness stand. Nor can it be said with reason that they did not act wisely in the light of the character of testimony given by Palakiko and Majors at the instant hearing. . . ."
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> *Application of Palakiko and Majors*, 39 Haw. 167, 181

V

THERE WAS NO MOB DOMINATION OR ANY OTHER INTERFERENCE WITH APPELLANTS' TRIAL SUCH AS TO CONSTITUTE A DENIAL OF THE RIGHT TO A FAIR TRIAL.

In *Frank* v. *Mangum*, 237 U.S. 309, 335, the Supreme Court stated that "... if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no

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[189]Appellants' Op. Br. p. 160

[190]Appellants' Op. Br. p. 160

corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Then, in *Moore* v. *Dempsey*, 261 U.S. 86, the Court held that habeas corpus relief would lie on the following facts: After the petitioners, negroes, were arrested for the murder of a white man, a mob marched on the jail to lynch them. The mob was stopped only by United States troops. Witnesses were whipped and tortured until they promised to say what was wanted. The petitioners were brought into court for trial, informed that a certain lawyer was appointed their counsel and placed on trial before an all-white jury. The courthouse and vicinity were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. Counsel did not venture to demand a delay or change of venue, or challenge any juryman or ask for separate trials for the defendants. He had had no preliminary consultation with the accused, called no witnesses for the defense although they could have been produced, and did not put the defendants on the stand. The trial lasted about three quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in the county; and if any prisoner by any chance had been acquitted by jury, he would not have escaped the mob. It was not surprising that the Court found that there was a denial of due process.

Similarly, in Mr. Justice Jackson's concurring opinion in *Shepherd* v. *Florida*, 341 U.S. 50, he found a fair trial to have been denied where newspapers had reported that the defendants had confessed to murder, but no confessions were offered in evidence at the trial. There were other circumstances, however, including the following: A mob had gathered at the jail and demanded that the defendants be turned over to them; other mobs had burned negroes' homes; the National Guard had been called out; negroes fled the community; motions for a continuance and change of venue had been denied; and extreme precautions had been required to protect the defendants during the trial.

On the other hand, in *Stroble* v. *California*, 343 U.S. 181, a case recently before the Supreme Court upon appeal in the criminal case, the Court reached the opposite result. The case involved an exceptionally atrocious "sex murder" of a six-year-old girl. The defendant was arrested on November 17, 1949, three days after the murder, and trial was commenced on January 3, 1950. The defendant contended that newspaper accounts of his arrest and confession had been so inflammatory that he was denied a fair trial. There had indeed been considerable sensationalism in the publicity regarding the crime. Considerable publicity was given to the search for and apprehension of the murderer; there were banner headlines regarding the "manhunt"; defendant's confession was reported in detail; and the defendant was described in the newspapers as a "werewolf", "fiend" and "sex-mad killer". The district attorney announced to the press that he believed the defendant to be guilty. A special session of the legislature was called to consider in part "sex crimes". In the hearings before the legis-

lature the district attorney stated that sex offenders should be disposed of the same way as mad dogs. There were conferences of law enforcement committees, and various citizens' groups made proposals. On these facts the Court found that the defendant was not denied a fair trial, stating:

> "...Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by the newspaper stories. ...and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury. It is also significant that in this case the confession which was one of the most prominent features of the newspaper accounts was made voluntarily and was introduced in evidence at the trial itself."
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> 343 U.S. 181, 195

Also, in *Carruthers* v. *Reed*, 102 F.2d 933 (CA 8th), cert. denied 307 U.S. 643, after an extensive review of the circumstances which indicated considerable excitement in the community, the court found there was no mob domination.

As shown by the review of the circumstances in this case at pages 14 to 16 of this brief, the facts of the instant case are far removed from those in *Moore* v. *Dempsey* and *Shepherd* v. *Florida*. There was not the slightest evidence of any mob behavior. Nor was there any evidence that any juror or witness or that the judge was in any way prejudiced, intimidated or influenced by newspaper accounts or otherwise.

It is submitted that the conclusion of the court below was entirely in accord with the evidence:

> "...Most of this comment [newspaper], however, was directed against the crime itself and

the laxity of prison officials in allowing dangerous prisoners the opportunity of escape. . . . there is no evidence that it [newspaper articles] so aroused public feeling against the defendants that a change of venue became necessary or had the effect of intimidating or prejudicing any witness or juror at the trial. The *voir dire* was conducted by counsel, under supervision of the trial judge, in full exercise of statutory rights of examination and challenge for cause and of peremptory challenge. Three panels, totaling more than a hundred men, were exhausted. . . . The trial patently was conducted in a calm and judicial atmosphere and in a circumspect and orderly manner. Nor was there any sign, threat or fear of mob violence or any suggestion of mob spirit within the community. Indeed no semblance of a mob existed from the time of murder to the end of trial, or at any time, and no other influence that in any way impaired the securing of a fair and impartial trial, or that in any way affected the prosecuting authorities, the grand and petit juries, and the defense attorneys in carrying out their duties, or prevented a full and proper presentation of any defense."

Application of Palakiko and Majors, 39 Haw. 167, 179-180

VI

APPELLANTS' ATTACK ON THE CONSTITUTIONALITY OF THE MURDER STATUTE IS NOT WELL TAKEN.

Section 11390, Revised Laws of Hawaii 1945, defines the crime of murder in common law terms and provides that it shall be of two degrees, first and second, which shall be found by the jury. Section 11392, Revised Laws of Hawaii 1945, provides that a murder committed (a) "with deliberate premedi-

tated malice aforethought," or (b) "in the commission of or attempt to commit any crime punishable with death," or (c) "with extreme atrocity or cruelty," is murder in the first degree. Only the phrase "murder . . . committed with extreme atrocity or cruelty" has been brought into question in the case. This provision has been part of the statutory law of the Territory since 1890 (L. 1890, c. 72, § 2a), apparently adopted from the State of Massachusetts, which has had an identical statute since 1858. (Laws of Mass. 1858, c. 154, §§ 1-3) The validity of this provision has never been previously questioned in either jurisdiction, but the phrase has been discussed or defined in the following cases: *Republic of Hawaii* v. *Yamane*, 12 Haw. 189; *Commonwealth* v. *Desmarteau*, 82 Mass. 1; *Commonwealth* v. *Delvin*, 126 Mass. 253; *Commonwealth* v. *Gilbert*, 165 Mass. 45, 42 N.E. 336; *Commonwealth* v. *Feci*, 235 Mass. 562, 127 N.E. 602; *Commonwealth* v. *McGarty*, 323 Mass. 435, 82 N.E.2d 603.

Due process of law requires that the language of a penal statute must be sufficiently explicit so as to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally* v. *General Const. Co.*, 269 U.S. 385. The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct. *Williams* v. *United States*, 341 U.S. 97. Difficulty in determining whether certain marginal offenses are within the meaning of the language under attack for vagueness does not necessarily render a statute unconstitutional for indefiniteness. *United States* v. *Wurzbach*, 280 U.S. 396. Impossible

standards of specificity are not required. *United States* v. *Petrillo*, 332 U.S. 1.

In *Jordan* v. *De George*, 341 U.S. 223, the validity of a statute using the term "crime involving moral turpitude" was questioned. In finding this clause to be valid the Court said:

> "It is significant that the phrase has been part of the immigration laws for more than sixty years. . . . the phrase 'crime involving moral turpitude' has also been used for many years as a criterion in a variety of other statutes. No case has been decided holding that the phrase is vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process."
> 341 U.S. 223, 229-230

The same can well be said of the phrase "murder . . . committed with extreme atrocity or cruelty", which the court below found to meet due process requirements of certainty. *Application of Palakiko and Majors*, 39 Haw. 141.

But even if the phrase is unconstitutional, it does not follow that the appellants are entitled to habeas corpus relief.

The judgment in the murder case was based on a general verdict of guilty on three counts,[191] each of which charged murder in the first degree under section 11392, Revised Laws of Hawaii 1945. Only one of the three counts was predicated on the questioned phrase. Even if it is assumed that the provision in question is unconstitutional for vagueness, it does not follow that the judgment itself is void. On a collateral

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[191]App. p. 345, see also app. p. 19

attack by way of habeas corpus, the judgment is presumed to be valid. The conviction cannot be set aside unless the appellants can prove that the conviction rested on the invalid, and not on the valid, part of the statute. *Ex Parte Bell*, 19 Calif.2d 488, 122 P.2d 22. That appellants have failed to do.

VII

THE ATTACKS ON THE VALIDITY OF THE VERDICT OF THE JURY ARE LIKEWISE WITHOUT MERIT.

Appellants contend that the general verdict of "guilty as charged" was void because the first and second of the three counts, namely, (1) murder while committing the crime of rape, (2) murder while attempting to commit the crime of rape, and (3) murder committed with extreme atrocity or cruelty, each charging murder in the first degree,[192] are mutually exclusive, and that, therefore, the jury could not have found appellants guilty on both of the first two counts.

This contention is clearly untenable, as the statute does not create distinct offenses of murder in the first degree but only one offense, which may be committed by any of the several ways specified in the statute and for which the penalty is the same. *Republic of Hawaii* v. *Yamane*, 12 Haw. 189, 201. Since each of the three counts charged murder in the first degree, for which the penalty is the same, it would seem to make no difference on which of the counts the verdict was predicated. *Johnson* v. *United States*, 215 Fed. 679, cited by the appellants in their

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[192]App. p. 19

opening brief at page 164, is not to the contrary. In the *Johnson* case the court stated at page 687, "If one criminal act is charged in several ways, one good count, supported by competent evidence, will sustain a general verdict of guilty."

Appellants further attack the verdict on the ground that the second count does not charge murder in the first degree, but murder in the second degree. More specifically, the appellants contend (Op. Br. p. 131) that the second count of the indictment charges not murder in the first degree but murder in the second degree because it alleges a murder in the attempt to commit assault with intent to rape, as distinguished from a murder in the attempt to commit rape.

This contention is absurd on its face. Murder in the first degree is defined in section 11392, Revised Laws of Hawaii 1945, to include "murder committed . . . in the . . . attempt to commit any crime punishable with death". Section 11678, Revised Laws of Hawaii 1945, provides that the punishment for rape shall be ". . . death or . . . imprisoned at hard labor for life or any number of years". The second count clearly charges that the appellants murdered Mrs. Wilder in the attempt to commit the crime of rape, not, as contended by appellants, in the attempt to commit the crime of assault with intent to rape.[193]

Finally, the appellants attack the verdict on the ground that there was insufficient evidence to support it.

The court below held that it would not inquire into the sufficiency of the evidence upon which appellants

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[193]App. p. 20

were convicted.[194] The decision is in accord with the line of cases holding that habeas corpus cannot be used to inquire into the sufficiency of the evidence upon which a prisoner was convicted. *Sunal* v. *Large*, 332 U.S. 174; *Eagles* v. *Samuels*, 329 U.S. 304; *Harlan* v. *McGourin*, 218 U.S. 442; and *Crossley* v. *California*, 168 U.S. 640.

It is well established that habeas corpus does not lie to correct errors in criminal cases. Thus, the sufficiency of an indictment under which a defendent was tried and convicted cannot be collaterally attacked in habeas corpus. *Ex Parte Yarbrough*, 110 U.S. 651, 654; *Dimmick* v. *Tompkins*, 194 U.S. 540; *In re Coy*, 127 U.S. 731, 759. Mere error in jury verdicts, even though the error concerns voluntariness of a confession, does not violate due process. *Lyons* v. *Oklahoma*, 322 U.S. 596, 605. Even in a case where the court sentenced a defendant for first degree murder upon a verdict of guilty returned by the jury without specifying the degree of murder as required by statute, which left the determination of the degree of murder to the jury, it was held that the sentence, while erroneous, was not void and was not subject to collateral attack. *In re Eckart*, 166 U.S. 481. See also *Abrams* v. *United States*, 250 U.S. 616 at 619, where upon a direct appeal of a criminal case involving several counts upon which the jury returned a general verdict of guilty, it was held that the sentence must be sustained if it did not exceed the penalty which could have been imposed under any single count and if there was sufficient evidence to sustain any one count.

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[194] 39 Haw. 167, 182

VIII

THE CHARGES THAT PROSECUTING AUTHORITIES SUPPRESSED EVIDENCE FAVORABLE TO THE APPELLANTS IS ENTIRELY WITHOUT SUBSTANCE.

Appellants charge suppression of evidence in two instances, the first of which is that police officers concealed from the court and jury in the murder trial the "fact" that the confessions were involuntary, and more specifically, that police captain Straus concealed the fact that Palakiko had been at the police station from March 12 to March 17, 1948, and that Palakiko had been questioned before he made the recorded statement on March 20, 1948.

While it is true that Straus testified at the trial that as far as he knew Palakiko was kept at Oahu Prison,[195] that he did not know when Palakiko had been first questioned or where these earlier interrogations took place,[196] he stated that Palakiko was questioned prior to his confession[197] and that he had a preliminary conversation with Palakiko prior to the recorded statement.[198] Other police officers testified at the trial that Palakiko was questioned by Detectives King and Schneider on the evening of the 20th, as well as by Straus.[199] In addition, another officer testified that he questioned Palakiko at the police station after arresting him on March 12, 1948.[200] Moreover, Palakiko certainly knew where he had been detained from March 12 to March 20, 1948,

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[195]App. p. 345
[196]App. p. 346
[197]App. p. 346
[198]App. p. 347
[199]App. p. 348
[200]App. p. 350

and whether or not he had been questioned during that period.

If the defense in the criminal trial had desired to show that Palakiko was at the police station from March 12th to March 17th and the exact number of times he had been questioned during this period, they could easily have done so by subpoenaing the records of the police department or of Oahu Prison or by questioning the officers involved. Whether he was detained at the police station or at Oahu Prison certainly didn't make much difference to Palakiko. Apparently the defense did not consider the events of March 12 to 17, 1948, particularly material to the confession of March 20th, 1948, and rightly so, in view of the fact that even Palakiko admits he was not mistreated during this period.[201] *Lyons* v. *Oklahoma*, 322 U.S. 596, and *Lisenba* v. *California*, 314 U.S. 219. It appears that this charge of concealment is merely an effort by present counsel for the appellants to drag in the *McNabb* rule, which has been shown to be inapplicable in part III of this argument.

The second charge of suppression is that a Federal Bureau of Investigation report on an examination of certain garments of Mrs. Wilder showing that they bore no semen stains[202] was suppressed by prosecuting officers. The existence of the report must have been known to defense counsel at the time of the trial, for Detective Cobb-Adams testified that some of Mrs. Wilder's garments had been sent to the Bureau's laboratory for chemical analysis. In fact, counsel objected to the introduction of these garments on the

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[201]App. p. 351 [202]App. p. 351

ground that changes had been made in them after removal from the body.[203]

The report was in the possession of the Prosecutor's office at the time of the trial. Being negative it was not offered in evidence; being hearsay, it would not have been admissible.[204] Certainly the report would not have proved or disapproved a rape or attempted rape. Moreover, it would have been merely cumulative to Dr. Majoska's testimony that he found no spermatozoa in Mrs. Wilder's vagina.[205]

Neither this report nor the facts of Palakiko's detention and questioning at the police station from March 12 to 17, if considered on the grounds of newly discovered evidence, would entitle the appellants to a new trial under Rule 33 of the Federal Rules of Criminal Procedure. See *Brandon* v. *United States*, 190 F.2d 175 (CA 9th), wherein this Court held that a defendant cannot withhold evidence at his trial and on conviction seek a second chance before a new jury. In order to obtain a new trial on newly discovered evidence, this Court in the *Brandon* case found the rule to be as follows:

> ". . . 'There must ordinarily be present and concur five verities, to wit: (a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that,

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[203]App. p. 352 n. 202, p. 351
[204]App. p. 355, see also [205]App. p. 357

on a new trial, the newly discovered evidence would probably produce an acquittal.'"

In regard to the alleged suppression in the instant case, the court below found:

> "Illustrative of that attempt are the allegations of petition and traverse that the prosecution concealed from the trial court the facts concerning the manner in which the confessions were obtained. But such concealment, if any existed, would be attributable with greater force to Palakiko and Majors, who, at the close of the prosecution's case, rested their case. They did not take the witness stand to give their version of the manner in which the confessions were obtained or contradict the witnesses for the prosecution who gave their version subject to strenuous cross-examination as well as to interrogation by the trial judge. It is evident from the record of trial that the allegations of concealment have no substance and are a mere subterfuge for evading the effect of orderly criminal prosecution and of appellate review. . . .
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> "On review of the entire record of hearing and trial, this court further finds that there was no force, violence, duress, threats, misrepresentations or promises of immunity or reward made to obtain the confessions of either Palakiko or Majors and *a fortiori* no concealment thereof at the trial. . . ."
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> *Application of Palakiko and Majors*, 39 Haw. 167, 173-174, 178

There was no semblance of fundamental unfairness which would entitle the appellants to relief on the ground of suppression of evidence. Certainly there was nothing to bring this case within the rule of

Mooney v. *Holohan*, 294 U.S. 103, where the following allegations were held to make out a case for relief in habeas corpus:

> ". . . the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him. He alleges that he could not by reasonable diligence have discovered prior to the denial of his motion for a new trial, and his appeal to the Supreme Court of the State, the evidence which was subsequently developed and which proved the testimony against him to have been perjured. . . ."
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> 294 U.S. 103, 110

Nor is there any resemblance to *United States* v. *Baldi*, 195 F.2d 815, in which the Court of Appeals for the Third Circuit granted relief on the following facts: The prosecuting authorities attempted to show that the defendant in a murder case had fired the fatal shot that killed a police officer, when in fact the prosecutors and police knew that the officer had been shot by mistake by another officer. The defendant and his attorney at the time of trial had no knowledge of this conclusive evidence and its existence was carefully and deliberately concealed from the defendant, his attorney, the court and jury.

If the *Mooney* and *Baldi* cases show what constitutes suppression, *Jordan* v. *Bondy*, 114 F.2d 599 (CA D.C.), shows what is not. There the petitioner asserted that he was entitled to habeas corpus relief because the prosecuting authorities suppressed a police "incidental" and the testimony of certain wit-

nesses. This information was not given to the defendant or his attorney or introduced as evidence. Relief was denied on the ground that the evidence allegedly suppressed was inconclusive, cumulative, in part inadmissible and there was no evidence that the information was in fact suppressed. Regarding the duty of the prosecutor to disclose information, the opinion of the court by Justice Rutledge stated:

> "Appellant's contentions, applied most broadly and especially in the manner sought here, go far beyond these constitutional guaranties and any statutory rights of the accused. In effect they would impose upon the prosecuting officer the duty not only to represent the public, but to represent the accused so far as not only to disclose but to discover evidence which might be considered material to the defense, regardless to some extent of its admissibility, its merely cumulative effect, its equal availability to the accused, and its probable probative effect. Nothing in the Constitution or statutes imposes so broad an obligation. That is true even though it is admitted that the prosecutor not only is not allowed actively to suppress evidence vital to the accused, but is required in certain circumstances to disclose such evidence to him or to the court in order to avoid what would amount in practical effect to concealment. Whether such a disclosure may be required depends of course upon the nature of the evidence, its admissibility and probative value when considered in connection with the other evidence presented in the case.
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> "We think therefore that the charge of suppression of evidence comes to naught; first, because it has not been shown that the alleged evidence would have been helpful to the appellant,

since, directed as it was chiefly toward the issue of his identification as the robber and murderer, it could only have been cumulative to that given by other witnesses and, like theirs, therefore could not have overcome the effect of his confessions; second, because in the respects we have specified it was inadmissible; and, finally, because there is no evidence whatever that the prosecuting officials were guilty of suppressing evidence, either with respect to the police incidental or with reference to oral testimony or other evidence.

"The Constitution literally requires only that the accused 'be confronted with the witnesses against him,' and that mandate was complied with literally at the trial. But if the spirit requires the letter to be construed more broadly, so as to require the prosecutor to disclose, in order not to conceal, evidence which comes to his knowledge prior to the trial and vitally affects the question of guilt or innocence, whether to the court or to the accused or his counsel, there is no violation of either letter or spirit when he merely fails to disclose evidence of which he has no knowledge or fails simply to use or disclose evidence which is only vague, inconclusive and cumulative, as was that in question here. It has been held repeatedly that the prosecution is under no obligation to call all witnesses subpoenaed by the Government, and we now hold that it is no sufficient ground for release by habeas corpus from punishment lawfully imposed that the prosecution either does not discover or does not use as witnesses or disclose the names of persons whose testimony can be only cumulatively corroborative of facts fully proven by other witnesses or evidence. . . ."

114 F.2d 599, 602, 604

As in the *Bondy* case, there was in the instant case no concealment, as all of the facts allegedly concealed were known to the appellants and their attorneys.

IX

THE CHARGE THAT APPELLANTS WERE CONVICTED BY PERJURED TESTIMONY IS NOT ONLY FALSE BUT IRRESPONSIBLE.

Even more insubstantial than the charge of concealment is this charge of perjury. It is undefined, but pervades the whole of the opening brief. Perhaps it is not unreasonable for appellants to urge that testimony in conflict with theirs is perjured—at least, they would be consistent. Yet it is more likely that it is but another of appellants' irresponsible attacks on law enforcement agencies. Suffice it to say that the court below found this contention of the appellants to be false, stating:

> ". . . Nor is there any indication that the testimony, on which the confessions were determined to be voluntary at the trial, is perjured and discovered to be such after trial so as not to have been open to consideration or reviewed on appeal. On the contrary, the hearing conclusively establishes such trial testimony to be credible, substantial and sufficient to warrant the admission of the confessions into evidence as the basis for conviction as determined on appellate review."
>
> *Application of Palakiko and Majors*, 39 Haw. 167, 178

X

DEFENSES IN CRIMINAL CASES MAY NOT BE RESERVED AS GROUNDS FOR COLLATERAL ATTACK ON THE JUDGMENT.

Closely related to the rule that habeas corpus cannot be used as an appeal or writ of error is the rule that defenses available to a defendant in a criminal trial may not be withheld or reserved at the time of the criminal trial and appeal therefrom and later raised or pursued in habeas corpus. *Glasgow* v. *Moyer*, 225 U.S. 420; *Kaizo* v. *Henry*, 211 U.S. 146; *Carruthers* v. *Reed*, 102 F.2d 933 (CA 8th), cert. denied 307 U.S. 643; *In re Abreu*, 27 Haw. 237; *Ex Parte Mitchell*, 35 Calif.2d 849, 221 P.2d 689. As stated in *Glasgow* v. *Moyer*, *supra*:

> ". . . It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict."
>
> 225 U.S. 420, 430

More particularly on the charge of perjured testimony, it was held in the *Mitchell* case that a defendant may not remain silent in the criminal trial and subsequently urge in habeas corpus that the prosecution's testimony was perjured.

XI

ALL OTHER GROUNDS URGED FOR REVERSAL ARE ALSO WITHOUT MERIT.

A. Rejection of testimony of Francis Hughes.

Appellants sought to impeach the testimony of Detective Stevens, who testified in the murder trial.

Since he was not available at the habeas corpus hearing, his former testimony was read into the record in the hearing. The impeaching testimony offered consisted of an alleged inconsistent statement made after the murder trial. No foundation for the impeachment as required by section 9843, Revised Laws of Hawaii 1945, was laid. The court below, following *Mattox* v. *United States*, 156 U.S. 237, rejected the testimony. *Accord: People* v. *Hines*, 284 N.Y. 93, 29 N.E.2d 483; *Nagi* v. *Detroit United Ry.*, 231 Mich. 452, 204 N.W. 126; *Lerum* v. *Geving*, 97 Minn. 269, 105 N.W. 967; *Baker* v. *Wyatt*, 49 Ga. App. 410, 175 S.E. 678.

B. Rejection of other testimony.

Appellants complain of the ruling of the court below in rejecting the testimony of Ernest Heen, Jr., Ernest Heen, Sr., and the personal records of the police department regarding Vernal Stevens, all of which were offered for the purpose of impeaching on a collateral issue the testimony given on cross-examination by Captain Straus and Chief of Police Hoopai, who were witnesses for the appellee.

It is fundamental that the answer of a witness on cross-examination as to a collateral matter is binding on the cross-examiner and may not be contradicted. 58 Am. Jur. 433, § 784; 3 Wigmore, Evidence §§ 1001-1003 (3d ed.); *Martin* v. *United States*, 127 F.2d 865 (CA D.C.)

Furthermore, this Court will not decide what the rules of evidence should be in the courts of the Territory of Hawaii. *Palakiko* v. *Territory of Hawaii*, 188 F.2d 54 (CA 9th).

C. Majors' prior conviction for burglary.

Majors was convicted of the crime of burglary in 1945 and was sentenced to be imprisoned at Oahu Prison for a term not exceeding ten years.[206] The question of the validity of the burglary conviction would seem to be quite immaterial unless and until the murder conviction is held to be invalid. Such moot questions will not be considered in habeas corpus. *In re Lincoln*, 202 U.S. 178. See also *McNally* v. *Hill, Warden*, 293 U.S. 131, and *Ex Parte Russell*, 52 Okla. Cr. 136, 3 P.2d 248, where it was held that habeas corpus relief is unavailable where the petitioner is lawfully in custody for another offense.

D. Charge of unlawful arrest.

While it is absurd to speak of the "unlawful arrest" of an escaped convict, nevertheless the matter will be given brief attention.

A prisoner will not be discharged from custody by habeas corpus on the ground that there were errors or irregularities in his original arrest, commitment or detention, where there is sufficient basis for his imprisonment, whether by indictment or judgment. *Yordi* v. *Nolte*, 215 U.S. 227; *Frisbie* v. *Collins*, 342 U.S. 519; *Hall* v. *Johnston*, 86 F.2d 820 (CA 9th); *Price* v. *Johnston*, 144 F.2d 260 (CA 9th), cert. denied 323 U.S. 789; *Young* v. *Sanford*, 147 F.2d 1007 (CA 5th), cert. denied 325 U.S. 886.

The *Frisbie* case is an extreme case of unlawful arrest and detention recently before the Supreme Court. There the petitioner sought habeas corpus

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[206]App. p. 45

relief on the grounds that while he was living in Chicago, Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan in violation of the Federal Kidnapping Act (18 U.S.C. 1201). The Court nevertheless stated the rule to be as follows:

> "This Court has never departed from the rule announced in *Ker* v. *Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."
>
> 342 U.S. 519, 522

CONCLUSION

In many respects appellants' case has followed the now rather familiar pattern of a broad, diversified attack on law enforcement agencies, in which appellants have had the advantage of being able to make serious charges with complete irresponsibility. It has been the purpose of this brief to refute all of the charges, though not point by point, for in taking down a tree it is just as effective to cut it off at the trunk as to lop off branch after branch.

It is submitted that appellants have failed to sustain any of their assignments of error and that therefore the judgment of the court below should be affirmed.

Dated at Honolulu, Hawaii, this 6th day of October, 1952.

Respectfully submitted,

MICHIRO WATANABE,
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FRANK D. GIBSON, JR.,
Deputy Attorney General

Attorneys for Appellee

No. 13397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Hus only

DON MARX,

Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Respondent.

RESPONDENT'S REPLY BRIEF.

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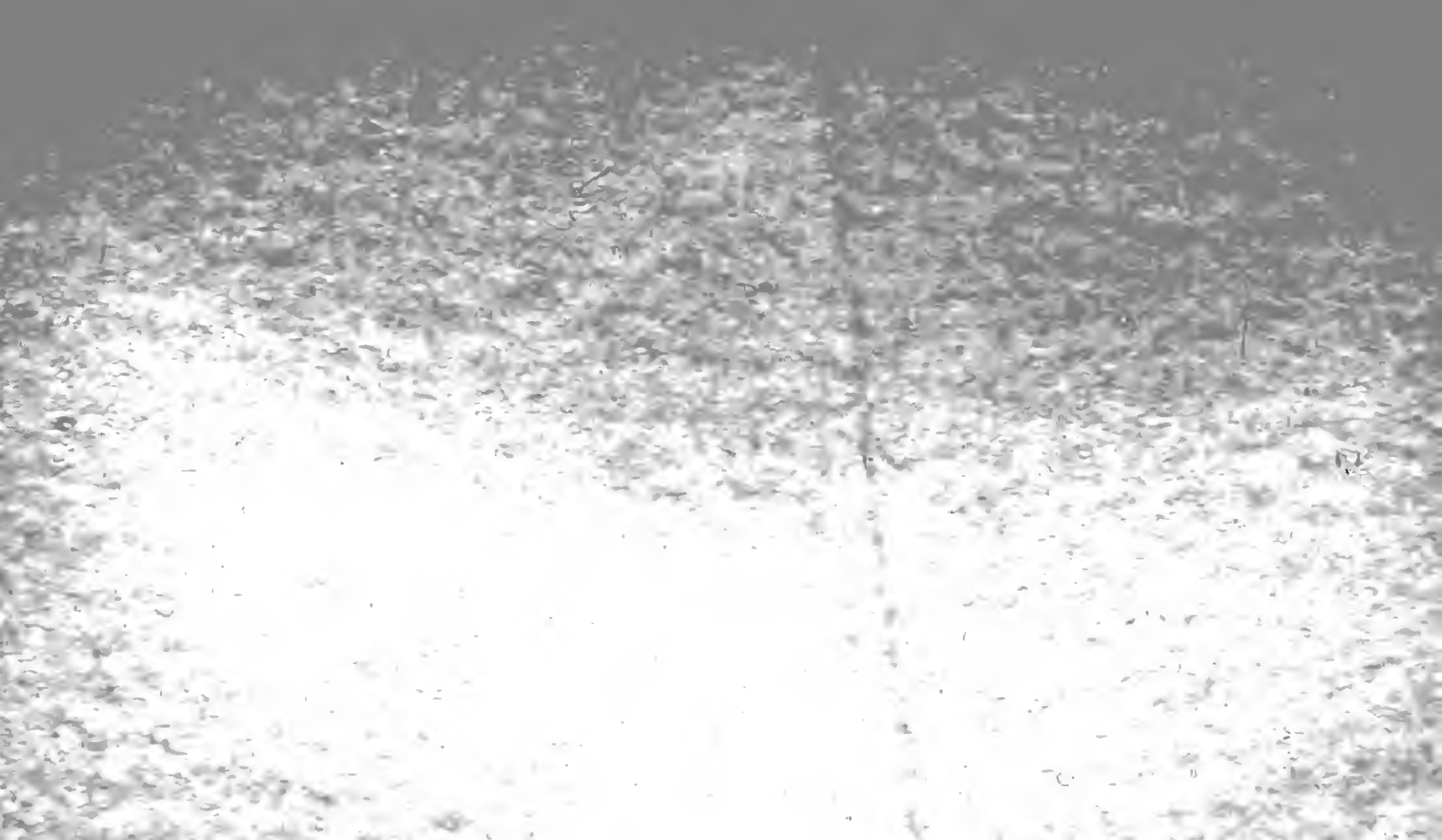

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TABLE OF AUTHORITIES CITED

STATUTES

No. 13397

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DON MARX,

Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Respondent.

RESPONDENT'S REPLY BRIEF.

Jurisdiction.

The appellant, Don Marx, filed an action for wrongful attachment against the respondent, United States Fidelity and Guaranty Company, in the District Court of the United States, Southern District of California, Central Division [Tr. pp. 2-9].

The Complaint [Tr. p. 2], the Stipulation and Order, hereinafter referred to as the Stipulation [Tr. p. 14] and the Findings of Fact and Conclusions of Law, hereinafter referred to as the Findings [Tr. p. 43] each recite that the appellant was and now is a resident of California.

The Complaint [Tr. p. 2], the Stipulation [Tr. p. 14] and the Findings [Tr. p. 43] set forth the fact that the respondent corporation was organized and existing under the laws of the State of Maryland and doing business in the County of Los Angeles, State of California.

The Complaint [Tr. pp. 3-6], the Stipulation [Tr. p. 14] and the Findings [Tr. pp. 43-50] each disclose that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Pursuant to the Stipulation [Tr. pp. 14-21], that the only issue to be determined by the court was the amount of damages the appellant, Don Marx, was entitled to recover from the respondent, United States Fidelity and Guaranty Company, the Honorable Harry C. Westover of the aforesaid District Court on March 31, 1952, caused a judgment in the sum of $25.00 to be entered in favor of the appellant [Tr. pp. 51-52].

Thereafter and on April 25, 1952, the appellant filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit [Tr. p. 53]. In addition to the said notice of appeal the said appellant filed simultaneously a statement of points on appeal and assignment of error [Tr. p. 54], and a designation of contents of record on appeal [Tr. p. 55]. A supplemental designation of contents of record on appeal [Tr. p. 57] was filed on April 29, 1952.

The jurisdiction of the District Court was based upon the amount in controversy exceeding the sum of $3,000.00, exclusive of interest and costs (62 U. S. Stat. 930, 28

U. S. C. A., Sec. 1331) and upon the fact that there was a diversity of citizenship between the parties to the said action (62 U. S. Stat. 930, 28 U. S. C. A., Sec. 1332). Jurisdiction in this court of appeals is based upon its right to review by appeal a final judgment of a district court embraced within its area of jurisdiction (62 U. S. Stat. 929, 28 U. S. C. A., Sec. 1291; 62 U. S. Stat. 930, 28 U. S. C. A., Sec. 1294).

Statement of the Case.

Inasmuch as the respondent controverts the Statement of the Case set forth in appellant's brief in two particulars, and because we deem it inadequate in other respects, we are supplementing the Statement of the Case as follows: The appellant was a resident of California [Complaint, Tr. p. 2; Stipulation, Tr. p. 14; Findings, Tr. p. 43]. The respondent was a corporation organized in the State of Maryland [Complaint, Tr. p. 2; Stipulation, Tr. p. 14; Findings, Tr. p. 43]. The appellant by his Complaint against respondent for a wrongful attachment seeks damages in the sum of $9,861.78 [Complaint, Tr. pp. 2-18].

On December 17, 1947, one Andre Dusel commenced an action in the Superior Court of the County of Los Angeles for the recovery of $9,861.78 against the appellant, Don Marx, entitled "Andre Dusel, Plaintiff, vs. Don Marx, Don Marx, doing business under the firm name and style of Coronet, *et al.*," numbered 538,461 [Complaint, Tr. p. 3; Stipulation, Tr. pp. 14-15, and Findings, Tr. p. 44]. At the time said action was instituted

and on December 17, 1947, said Andre Dusel made application for a writ of attachment, whereupon the respondent, United States Fidelity and Guaranty Company, executed an undertaking whereby it obligated itself to pay all costs to the defendant Marx if he recovered judgment and all damages [Complaint, Tr. pp. 3-8; Stipulation, Tr. pp. 15-17, and Findings, Tr. pp. 44-47] which defendant may sustain by reason of such judgment. Thereupon a writ of attachment issued and was executed by the Sheriff of Los Angeles County, who took possession of stock and equipment in said Coronet Restaurant on December 17, 1947, and retained possession thereof until January 22, 1948 [Complaint, Tr. p. 5; Stipulation, Tr. p. 18, and Findings, Tr. p. 47]. On January 8, 1948, the appellant herein filed a proceeding for an arrangement under Chapter 11 of the Act of Congress relating to bankruptcy, and was adjudged a bankrupt on March 9, 1948 [Stipulation, Tr. p. 19, and Findings, Tr. p. 48]. On January 16, 1948, the appellant Don Marx was duly discharged in said bankruptcy proceedings [Stipulation, Tr. p. 19, and Findings, Tr. p. 48]. On May 24, 1949, the trustee in bankruptcy abandoned the cause of action for wrongful attachment to the appellant herein [Stipulation, Tr. p. 19, and Findings, Tr. p. 49].

On December 17, 1947, the date upon which the writ of attachment was issued, the appellant was the lessee of the Coronet Restaurant [Stipulation, Tr. p. 19; Findings, Tr. p. 48]. On September 12, 1950, the Superior Court of Los Angeles County rendered judgment against Andre Dusel in favor of Don Marx in said action No. 538,461.

No appeal was taken from the judgment and it has become final. Prior to the bringing of the within action appellant demanded payment of his damages for such attachment from the said Andre Dusel [Stipulation, Tr. pp. 19-20; Findings, Tr. p. 49].

On January 6, 1948, the lessor of said Coronet Restaurant served the appellant Don Marx with a Notice to Quit the Premises for Non-payment of Rent for the month of January, 1948 [Stipulation, Tr. p. 19; Findings, Tr. p. 48]. The parties hereto stipulated to all facts except the amount of damages which the appellant Don Marx was to recover from the respondent, United States Fidelity and Guaranty Company, a corporation [Stipulation, Tr. pp. 14-21]. Subsequently thereto and on January 8, 1948, the appellant filed a proposed Plan of Arrangement under Chapter 11 of the Act of Congress relating to bankruptcy wherein he stated that the said Coronet Restaurant had been operated at a loss from January, 1947 to December 17, 1947 [Stipulation, Tr. p. 19; Findings, Tr. p. 48]. Notwithstanding this, the appellant on March 24, 1952, filed in the within action a written offer of proof wherein he offered to prove by the oral testimony of himself and that of his former partner, Al Swartz, a purported expert on the operation of restaurants, that during the period from December 17, 1947 to March 8, 1948, the reasonable value of the said restaurant was $200.00 on Saturdays, Sundays and holidays and $100.00 a day for every remaining day of the said period of time and that the said restaurant was worth the sum of $50,000.00 [Tr. pp. 28-33].

The court thereafter rendered an opinion [Tr. pp. 34-41] wherein it ordered judgment in favor of the appellant for the sum of $25.00. Findings of Fact and Conclusions of Law were prepared and filed. In the opening paragraph of the Findings the court stated that it considered the pleadings, the Stipulation of the parties, an examination of the Petition for an Arrangement filed by the appellant, the request of appellant that the court hear evidence set forth in his offer of proof and the Memoranda of Authorities by Counsel. The court refused, however, to hear any oral testimony [Findings, Tr. pp. 43-50]. Subsequently thereto and on the 31st day of March, 1952, a judgment was entered in favor of the appellant in the sum of $25.00 [Tr. pp. 51-52]. The appeal is from such judgment.

The appellant in his opening brief states, "* * * appellant made demand for payment of his damages suffered by reason of the attachment upon Andre Dusel and upon respondent, his surety." In the Stipulation it is stated that the demand was made on Andre Dusel [Tr. p. 20].

Appellant in his brief further states that the rent on the Coronet Restaurant was paid for the month of January, 1948 (App. Op. Br. pp. 5-6), whereas in the Stipulation it is stated that on January 6, 1948, a Notice to Quit Said Premises was served upon appellant for nonpayment of rent for the month of January, 1948 [Tr. p. 19].

ARGUMENT.

I.

An Appellate Court Should Not Reverse a Judgment Which Is Supported by Substantial Evidence.

The jurisdiction of an appellate court begins and ends with its determination that the judgment is supported by substantial evidence.

Estate of Boggs, 19 Cal. 2d 324, 121 P. 2d 678.

If the judgment is supported by substantial evidence and if there are no prejudicial errors in the record, the judgment should be affirmed.

Jones v. Rutherford, 8 Cal. 2d 603, 67 P. 2d 92.

The measure of damage for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention.

Atlas Development Co. v. National Surety Co., 190 Cal. 329, 212 Pac. 196;

Dunlop v. Farmer, 64 Cal. App. 691, 222 P. 2d 640;

Hurd v. Barnhart, 53 Cal. 97;

National Surety Co. v. Jean, 36 F. 2d 468.

In *Atlas Development Co. v. National Surety Co.,* 190 Cal. 329, 212 Pac. 196, the court stated:

> "* * * There is no ground to question that a proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention * * *."

Appellant herein asserts that he is entitled to damages as follows: loss of goodwill, $10,000.00; loss of value of the use of the property during detention, $200.00 per day on holidays, Saturdays and Sundays, $100.00 per day during the balance of time the property was wrongfully withheld; loss of profit from a contemplated sale of the leasehold and fixtures, $10,000.00. We submit that such elements of damage are remote and speculative and are therefore not proper items of damages.

In *Atlas Development Co. v. National Surety Co., supra,* the defendant therein had attached an oil rig belonging to the plaintiff and used in the County of Contra Costa, California. The attachment was wrongful. In an action for damages the plaintiff therein offered evidence that he had contracted to sell the oil rig to a business concern in Texas and also evidence of his loss by reason of the delay in shipping the said rig to Texas. In excluding such evidence the court said,

> "* * * It is clear at once that such a measure of damages, particularly when not shown to have been within the contemplation of the surety corporation, would be remote, speculative and uncertain."

See also:

Gilmore v. Thwing, 9 P. 2d 775;
Hurd v. Barnhart, 53 Cal. 97.

The period for which the appellant is entitled to damages is from December 17, 1947, when the attachment was made until January 8, 1948, the day the appellant filed a voluntary petition in bankruptcy.

See:

National Surety Co. v. Jean, 36 F. 2d 468.

"* * * That substantial injury may have been suffered as between the date of the filing of the affidavit in attachment * * *, and the date of adjudication in voluntary bankruptcy, * * * cannot be denied.

"* * * We cannot view the filing of a voluntary petition in bankruptcy as other than wholly independent of and disconnected from the wrongful attachment, whether dictated by motives of equality of treatment to all creditors or a determination to at least defeat payment in full to the attaching creditors. There was nothing compulsory in this voluntary act on the part of appellee. Injury to credit, loss of profits, diminution of business, or other loss directly attributable to the attachment might be recovered, but the period for the computation of such damages ended, so far as damage to her business was concerned, with the filing of the bankruptcy petition * * *"

The evidence in the record on the nature and extent of damages was given by the plaintiff in his voluntary petition for bankruptcy. The plaintiff stated that the Coronet Restaurant had been operated at a loss for the eleven months preceding the attachment. We submit that such evidence is substantial and that it does support the judgment. Under such circumstances, the judgment should be affirmed.

Jones v. Rutherford, 8 Cal. 2d 603, 67 P. 2d 92.

We submit that the appellant has failed to show that he has sustained any actual damages. Under such circumstances only nominal damages can be allowed.

Peterson v. Weisner, 62 Nev. 184, 146 P. 2d 789;

Bartley v. J. M. Radford Grocery Co., 15 S. W. 2d 46.

While the appellant made an offer of proof on the subject of damages which was excluded, but which if admitted would have only raised a conflict with other evidence offered by him, there was no prejudicial error committed in excluding this offer of proof. The propriety of the trial court's action in respect to the exclusion of the offer of proof is discussed in a subsequent portion of the brief.

Upon adjudication of bankruptcy, title to the bankrupt's property vests in the trustee as of the date of filing the petition.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270.

The trustee in bankruptcy must manage and conserve the bankrupt's property to the end that it might be impartially distributed to the bankrupt's creditors.

A trustee in bankruptcy is not bound to accept property of a bankrupt which is onerous or of an unprofitable character.

See:

National Bank v. Lasater, 196 U. S. 115, 49 L. Ed. 408, 25 S. Ct. 206.

In the case at bar the trustee did not abandon the cause of action for wrongful attachment until May 24, 1949, long after the appellant had been discharged as a bankrupt.

We submit that the action of the referee in bankruptcy in abandoning said cause of action is further evidence that the appellant did not sustain any substantial damage by reason of the attachment.

Appellant cites several cases for the proposition that he should be able to recover substantial damages even though the restaurant had not been operating at a profit. We contend that the cases cited by appellant do not support his assertion.

For instance, in *Osborne v. Durbin,* 301 Ky. 412, 192 S. W. 2d 198, the court held that, while the evidence was conflicting on the rental value of the property attached, the judgment was supported by substantial evidence. In *Scott v. Daggett,* 226 S. W. 2d 183, the court merely stated the general rule for damages for wrongful attachment. In *State for Use of Parkersburg Corporation Paper Co. v. U. S. F. G.,* 81 W. Va. 749, 95 S. E. 783, the court refused to decide the contention of the parties as to the item of damage of loss of profits, stating that there was substantial proof of other damages to the extent of the amount of the judgment.

II.

It Is Not Reversible Error to Exclude Evidence Which if Admitted, Would Not Affect the Decision on a Material Fact.

The appellant in his Proposed Plan of Arrangement filed with the Bankruptcy Court on January 8, 1948, stated that from January, 1947 until August, 1947, the said Coronet Restaurant was operated at a loss and consumed his capital reserve; that on August 5, 1947, he entered into an agreement with Andre Dusel, an experienced restaurant operator, wherein it was agreed that the said Andre Dusel should operate the restaurant, but that the operation of the restaurant by Andre Dusel was not profitable [Tr. pp. 23-24]. Consequently, there is a sworn statement by the appellant to the effect that from January, 1947 to December, 1947, eleven months, the restaurant was operated at a loss.

Under date of March 24, 1952, the appellant filed written offers of proof [Tr. pp. 28-33] wherein he offered to produce himself and Al Swartz, his former partner in said restaurant business as an expert witness on the value of the said restaurant and of the profit that could be realized from its operation from December 17, 1947, the day the attachment was run, to January 8, 1948, the day appellant filed his voluntary petition in bankruptcy. This, of course, only raises a conflict with his sworn statement of January 8, 1947.

In the Findings the District Court stated:

> "The above-entitled matter was considered by the Court upon the basis of the pleadings, the Stipulation of the parties, an examination of the Petition for an Arrangement filed by plaintiff, Don Marx, in the above-entitled Court, bearing No. 45,569 PH,

in the files of said Court, the request of plaintiff that the Court hear the evidence set forth in his Offer of Proof submitted to the Court, which request was denied by the Court, and the Memoranda and Authorities of Counsel; the Court refusing to hear any oral testimony, the Court now makes its Findings of Fact as follows:"

This matter was tried without a jury. Thus we see that while the trial court did not permit the appellant to produce oral testimony in support of his offer of proof, it did review such offer and consider such offer and the substance thereof in reaching its decisions.

It is not reversible error to exclude evidence which could not affect the decision on a material fact.

See:

Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 123 P. 2d 20;

Adams v. Cook, 15 Cal. 2d 352, 362, 101 P. 2d 484;

Linden v. Rubens, 76 Cal. App. 2d 688, 173 P. 2d 713.

In the case of *Linden v. Rubens, supra,* the court at page 692 stated:

"The rejection of the testimony of Frank Rubens was the privilege of the trial judge; in fact, it was his duty to reject it if it did not have a convincing quality. Indubitably the court was influenced by Frank's statement on January 19 that Arons had paid $7,200 for the bankrupt stock whereas the files of the bankruptcy proceeding disclosed that only $3,000 had been paid by Arons for all the merchandise. It is strictly the function of the trial judge to determine the ultimate facts from a consideration of all the evidence submitted. His findings in the absence of

prejudicial error will not be disturbed and they should be given the benefit of every reasonable inference fairly deducible from the evidence. (*Herbert's Laurel-Ventura, Inc. v. Laurel Ventura Holding Corp.,* 58 Cal. App. 2d 684, 690 (138 P. 2d 43); *Lorraine v. City of Los Angeles,* 55 Cal. App. 2d 27, 30 (130 P. 2d 140).)"

We submit that the testimony of the so-called expert witnesses, as set forth in the offer of proof, did not have any convincing quality when compared with the positive testimony by the appellant of the reasonable value of said property for loss of use during its period of detention, and particularly when the appellant's first testimony on value of loss of use was given at the time the said restaurant was under attachment.

The admission of expert testimony rests largely in the discretion of the trial court. Therefore, we respectfully submit that there was no reversible error in excluding the oral testimony of the so-called expert witnesses as contained in the said offer of proof.

Gilbert v. Gulf Oil Corp., 175 F. 2d 705.

"* * * questions as to admissibility of expert testimony should be left to the wise discretion of the trial judge * * * But in the exercise of this discretion, the court must still determine whether the subject matter of the suit is such that the issues cannot be properly understood or determined without the aid of opinion of persons of special knowledge or experience, * * *."

The appellant cites the case of *Builders Steel Co. v. Commissioner of Internal Revenue,* 179 F. 2d 377, in support of his position that the trial court should have admitted the oral testimony set forth in his offer of proof.

We submit that the case does not support the appellant, as in that case the court excluded competent and material evidence. We have demonstrated that the offer of proof was not competent or material and at best would have only raised a conflict in the evidence and would not have affected the judgment.

When the entire transcript is considered it is evident that there is no prejudicial error. Therefore, the case of *United States v. United States Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525, cited by appellant has no application to the case at bar.

III.

It Is Not Reversible Error to Exclude Evidence Offered by a Party Which if Admitted, Would Only Raise a Conflict With Former Evidence Given by Such Party.

As previously mentioned, the appellant in a verified document, had stated that the restaurant operated at a loss from January, 1947 to August, 1947, and from August, 1947 to December, 1947, the operation of the restaurant was not profitable. By his offers of proof the appellant offered to produce so-called expert witnesses that the restaurant could have been operated at a profit from December 17, 1947, the date the attachment was run, until he, the appellant, filed his voluntary petition in bankruptcy on January 8, 1948.

We submit that the evidence contained in the offer of proof, if admitted, would only raise a conflict with other testimony given by the appellant.

It is not reversible error to exclude evidence offered by the appellant party which, if admitted, would only raise a conflict with other evidence given by the appellant.

In *Collins v. Calif. Street Cable R. R. Co.,* 91 Cal. App. 752, 756, 267 Pac. 731, the court stated:

> "The appellant assigns as error the ruling of the trial court in striking out the answer of the motorman of the west-bound car as to what he thought the respondent was going to do when he saw him standing between the rails, and also the answers of this and another witness that it was a matter of frequent occurrence to see pedestrians standing in safety between the tracks as cars passed going in opposite directions. We see no error in these rulings. The fact that the motorman of the west-bound car gave such vociferous warnings of his approach supported the inference that he knew the respondent was in a perilous position and likely to be struck by his approaching car while his statement that he thought that the respondent was intending to board the east-bound car merely created an inconsistency with his positive testimony of what he saw and knew. * * *"

See also:

Almaden Vineyards Corp., etc. v. Arnerich, 21 Cal. App. 2d 701, 70 P. 2d 243;

Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 123 P. 2d 26;

Adams v. Cook, 15 Cal. 2d 352, 101 P. 2d 484;

Linden v. Rubens, 76 Cal. App. 2d 688, 173 P. 2d 713.

Conclusion.

We submit that there is no prejudicial error nor any error in the record and that therefore the judgment should be affirmed.

Respectfully submitted,

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No. 13398

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

TAMOTSU FUJISAKI and RAYMOND C. L. CHEONG, Owners of Twelve (12) Hollycrane "Digger" Type Coin-Operated Machines,

Appellees.

Transcript of Record

Appeal from the United States District Court, District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13398

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

TAMOTSU FUJISAKI and RAYMOND C. L. CHEONG, Owners of Twelve (12) Hollycrane "Digger" Type Coin-Operated Machines,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Libelant, United States of America;

HOWARD K. HODDICK, ESQ.,
Acting United States Attorney,

District of Hawaii,
Federal Building,
Honolulu, T. H.

For the Respondent, Twelve (12) Hollycrane "digger" Type Coin Operated Machines,

HERBERT K. H. LEE, ESQ.,

304 Hawaiian Trust Bldg.,
Honolulu, T. H.

In the United States District Court
for the District of Hawaii

Civil No. 1123

UNITED STATES OF AMERICA,

Libelant,

vs.

TWENTY-ONE (21) Hollycrane "Digger" Type Coin-Operated Machines,

Respondent.

LIBEL OF INFORMATION

To the Honorable, the Presiding Judge of the United States District Court for the District of Hawaii:

Comes now the United States of America, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, who states and alleges as follows:

I.

That Tamotsu Fujisaki and Raymond C. L. Cheong, presently doing business as the Honolulu Amusement Company, have in their possession in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Twenty-One (21) Hollycrane "digger" type coin operated machines.

II.

The said Twenty-One (21) Hollycrane "digger" type coin operated machines were transported from

the State of Illinois into the Territory of Hawaii since January 2, 1951, and the said Tamotsu Fujisaki and Raymond C. L. Cheong, doing business as the Honolulu Amusement Company, received said Twenty-One (21) Hollycrane "digger" type coin operated machines from the State of Illinois since January 2, 1951.

III.

The said Twenty-One (21) Hollycrane "digger" type coin operated machines are mechanical devices designed and manufactured so that when [3*] operated they will deliver, as the result of the application of an element of chance, property. The said Twenty-One (21) Hollycrane "digger" type coin operated machines thus are gambling devices and the shipment of the said machines from the State of Illinois into the Territory of Hawaii is in violation of Public Law 906 of the 81st Congress, and under the provisions of Public Law 906 of the 81st Congress, the said Twenty-One (21) Hollycrane "digger" type coin operated machines are subject to seizure, condemnation, forfeiture and disposition according to law.

IV.

The said Twenty-One (21) Hollycrane "digger" type coin operated machines are presently stored in a warehouse at the Honolulu Airport, and the legal owners of the said Twenty-One (21) Hollycrane "digger" type coin operated machines are

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Tamotsu Fujisaki and Raymond C. L. Cheong, doing business as Honolulu Amusement Company.

Wherefore, the United States of America prays that due process issue against the said Twenty-One (21) Hollycrane "digger" type coin operated machines; that all persons interested and/or concerned with the same be cited to appear and show cause why the respondent Twenty-One (21) Hollycrane "digger" type coin operated machines should not be adjudged forfeited; that all due proceedings being had therein this Honorable Court condemn the respondent Twenty-One (21) Hollycrane "digger" type coin operated machines as aforesaid, to the United States of America; that a judgment condemning the respondent Twenty-One (21) Hollycrane "digger" type coin operated machines to the libelant may thereupon be made and entered; and for such other and further relief as this Honorable Court may deem proper in the premises.

Dated Honolulu, T. H., this 14th day of January, 1952.

/s/ HOWARD K. HODDICK,

Acting United States Attorney,
District of Hawaii. [4]

In the United States District Court
for the District of Hawaii

United States of America,
District of Hawaii—ss.

Howard K. Hoddick, being first duly sworn, on oath, deposes and says:

That he is Acting United States Attorney for the District of Hawaii; that he has read the above and foregoing Libel and knows the contents thereof; that he is informed and verily believes that the facts and things therein set forth are true.

/s/ HOWARD K. HODDICK,
Acting United States Attorney,
District of Hawaii.

Subscribed and sworn to before me this 14th day of January, 1952.

[Seal] /s/ G. C. ROBINSON,

Deputy Clerk, United States District Court for the District of Hawaii.

[Endorsed]: Filed Jan. 14, 1952. [5]

[Title of District Court and Cause.]

ORDER

In this cause, by agreement of the parties as evidenced by the signatures of their respective counsel, it is ordered that the Libel of Information and Monition heretofore filed in this cause be amended

so as to make the said Libel of Information and Monition refer to Twelve (12) Hollycrane "digger" type coin operated machines instead of Twenty-One (21) Hollycrane "digger" type coin operated machines as set out in the original Libel of Information and Monition.

The Twelve (12) Hollycrane "digger" type coin operated machines against which the amended Libel of Information and Monition now lies bear the following serial numbers: 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30. [7]

Dated Honolulu, T. H., this 20th day of February, 1952.

/s/ J. FRANK McLAUGHLIN,

Judge, United States District Court for the District of Hawaii.

HOWARD K. HODDICK,

Acting United States Attorney, District of Hawaii, Attorney for Libellant.

By /s/ NAT RICHARDSON, JR.,
Asst. United States Attorney,
District of Hawaii.

/s/ HERBERT K. H. LEE,
Attorney for Respondent.

[Endorsed]: Filed Feb. 20, 1952. [8]

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL OF INFORMATION

To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

Come now Tamotsu Fujisaki and Raymond C. L. Cheong, respondents, and answering the amended Libel of Information in the above-entitled cause, allege as follows:

I.

Answering paragraph (I), respondents admit the allegations of fact set forth therein.

II.

Answering paragraph (II), respondents admit the allegations of fact set forth therein.

III.

Answering paragraph (III), respondents state that the shipment of the said Twelve (12) Hollycrane "digger" type coin operated machines from the state of Illinois into the Territory of Hawaii is not in violation of Public Law 906 of the 81st Congress because at the time of said transportation, said machines had "closed shutes" fastened with explosive bolts making it physically impossible, for said machines to deliver any money or property; that the said machines at the time of shipment and transportation were not gambling devices as defined in Public Law 906 and, accordingly, are not subject to seizure, condemnation, forfeiture and disposition according to law. [10]

IV.

Answering paragraph (IV) therein, respondents admit the allegations of fact contained in paragraph (IV) therein.

Wherefore, respondents pray that the Libel of Information and Monition be dismissed.

Dated Honolulu, T. H., this 20th day of February, 1952.

TAMOTSU FUJISAKI and
RAYMOND C. L. CHEONG,
By /s/ HERBERT K. H. LEE,
Attorney for Respondents.

Territory of Hawaii,
City and County of Honolulu—ss.

Herbert K. H. Lee, being first duly sworn on oath, deposes and says: That he is the attorney for the respondents, Tamotsu Fujisaki and Raymond C. L. Cheong; that he has read the above and foregoing Libel and knows the contents thereof; that he is informed and verily believes that the facts and things therein set forth are true.

/s/ HERBERT K. LEE.

Subscribed and sworn to before me this 20th day of February, 1952.

[Seal] /s/ MILDRED K. MAEMORI,
Notary Public, First Judical Circuit, Territory of Hawaii.

My commission expires Nov. 31, 1952.

[Endorsed]: Filed Feb. 20, 1952. [11]

[Title of District Court and Cause.]

ORDER

The above-entitled matter having come on regularly for hearing on the 26th day of February, 1952, and the Court after examining the record, hearing the evidence stipulated by the United States of America and the Intervener-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong, through their respective attorneys, Nat Richardson, Jr., Assistant United States Attorney, and Herbert K. H. Lee, Esq., and listening to the arguments by counsel, and being fully advised in the premises and having rendered its oral decision finding that from all the evidence stipulated and adduced in said cause that the Government had failed to establish that the twelve (12) Hollycrane machines involved herein were gambling devices at the time their shipment was in transit and that the shipment of said machines was in violation of Public Law 906.

The Court finds from the evidence and the records herein that the said twelve (12) Hollycrane machines were not gambling devices at the time of its shipment from the State of Illinois to Hawaii and accordingly said shipment was not in violation of Public Law 906.

The Court further finds that Tamotsu Fujisaki and Raymond C. L. Cheong, are the owners of said twelve (12) Hollycrane machines and are entitled to the immediate and exclusive possession [13] thereof.

Now Therefore, It Is Hereby Ordered, Adjudged,

and Decreed, that Tamotsu Fujisaki and Raymond C. L. Cheong are the owners and entitled to the immediate and exclusive possession of said twelve (12) Hollycrane machines hereinafter described.

It Is Further Ordered that the Libel of Information heretofore filed in this Court in said cause be and the same is hereby dismissed.

It Is Further Ordered that the Libellant forthwith deliver to said Tamotsu Fujisaki and Raymond C. L. Cheong the said twelve (12) Hollycrane machines bearing serial numbers: 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30 its tools, accessories and appurtenances.

Dated Honolulu, Hawaii, 28th day of February, 1952.

/s/ D. E. METZGER,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ NAT RICHARDSON, JR.,
Asst. United States Attorney,
District of Hawaii.

[Endorsed]: Filed Mar. 5, 1952. [14]

[Title of District Court and Cause.]

ORDER

This cause came on to be heard before the Honorable Delbert E. Metzger, Judge of the United States District Court for the District of Hawaii, on February 26, 1952, upon the record in the cause and stipulation of counsel, and, after hearing evidence and the argument of counsel, the Court, being fully advised in the premises, rendered its oral decision finding that:

1. The Twelve (12) Hollycrane "digger" type coin operated machines involved in this matter, bearing serial numbers: 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30 were shipped from the State of Illinois to the Territory of Hawaii after January 2, 1951, and were received in the Territory of Hawaii by the Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong after January 2, 1951. [16]

2. The aforesaid Twelve (12) Hollycrane "digger" type coin operated machines are gambling devices but by reason of the fact that the machines had "closed shutes" fastened with bolts making it physically impossible for the said machines to deliver any money or property; that the said machines were not gambling devices at the time of said transportation from the State of Illinois to the Territory of Hawaii and therefore do not come within the purview of Public Law 906 and accord-

ingly are not subject to seizure, condemnation, forfeiture and disposition according to law.

Now Therefore It Is Hereby Ordered that the said Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong are entitled to possession of the said Twelve (12) Hollycrane "digger" type coin operated machines.

It Is Further Ordered that the Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong retain the said Twelve (12) Hollycrane "digger" type coin operated machines in their possession without disposing of the same pending an appeal by the United States of America to the Ninth Circuit Court of Appeals in San Francisco, California.

Dated Honolulu, T. H., this 28th day of February, 1952.

.....

Judge, United States District Court for the District of Hawaii.

Approved as to Form:

.....

Herbert K. H. Lee, Attorney for Intervenor-Respondents.

Advised by Mr. Nat Richardson, Jr., Assistant United States Attorney, District of Hawaii, that this order had been refused by the court.

[Endorsed]: Filed Mar. 6, 1952. [17]

[Title of District Court and Cause.]

ORDER

In this cause both parties, that is, the United States of America, Libelant, and Tamotsu Fujisaki and Raymond C. L. Cheong, Intervenor-Respondents, submitted proposed findings to the Court, and the Court, after examining the proposed findings submitted by both parties, is of the opinion and so finds that the findings submitted by the Intervenor-Respondents more accurately state the views of the Court.

It Is Accordingly Ordered that the order submitted by the Intevenor-Respondents be filed as the findings of the Court and that the findings submitted by the Libelant be refused.

Dated Honolulu, T. H., this 28th day of February, 1952.

/s/ D. E. METZGER,

Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed Mar. 6, 1952. [19]

In the United States District Court
for the District of Hawaii

Civil No. 1123

UNITED STATES OF AMERICA,

Libellant,

vs.

TWELVE (12) Hollycrane "Digger" Type Coin Operated Machines,

Respondent.

JUDGMENT

The above-entitled cause came on regularly for trial without a jury in the above-entitled Court before the Honorable Delbert E. Metzger, Judge Presiding, on the 26th day of February, 1952, the United States of America, Libellant, being represented by Nat Richardson, Jr., Assistant United States Attorney, and the Intervenor-Respondents Tamotsu Fujisaki and Raymond C. L. Cheong, being represented by Herbert K. H. Lee, Esq., as their attorney, and all of the evidence having been stipulated orally in Court in this cause on behalf of both the Libellant and the Intervenor-Respondents, and thereafter, the cause having been submitted and the Court having considered the same, and being fully advised in the premises and having heretofore made and filed its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Ordered, Adjudged and Decreed as follows:

I.

That the Twelve (12) Hollycrane Machines involved herein bearing serial numbers: [21] 1525-30; 1526-30; 1528-30; 1529-30; 1530-30; 1459-30; 1460-30; 1461-30; 1462-30; 1463-30; 1466-30; 1468-30; were not gambling devices at the time their shipment was in transit from the State of Illinois to the Territory of Hawaii.

II.

That the shipment of said Twelve (12) Hollycrane Machines was not in violation of Public Law 906.

III.

That Tamotsu Fujisaki and Raymond C. L. Cheong are the owners of said Twelve (12) Hollycrane Machines and Libellant is ordered to return the same to Tamotsu Fujisaki and Raymond C. L. Cheong, Intervenor-Respondents.

Dated Honolulu, Hawaii, on this 10th day of March, 1952.

By Order of the Court

/s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of Hawaii.

[Endorsed]: Filed and Entered Mar. 10, 1952. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73 (b)

Notice is hereby given that the United States of America, Libelant above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 10, 1952.

Dated at Honolulu, T. H., this eleventh day of March, 1952.

HOWARD K. HODDICK,
Acting U. S. Attorney,
District of Hawaii.

By /s/ NAT RICHARDSON, JR.,
Assistant U. S Attorney,
District of Hawaii.

[Endorsed]: Filed March 11, 1952. [24]

[Title of District Court and Cause.]

STAY OF JUDGMENT

In this cause it is ordered that the final order and judgment heretofore entered be stayed pending an appeal now noticed by the libelant to the Ninth Circuit Court of Appeals in San Francisco, California.

Dated: Honolulu, T. H., this 12th day of March, 1952.

/s/ D. E. METZGER,
Judge, United States District Court for the District of Hawaii.

[Endorsed]: Filed March 12, 1952. [26]

[Title of District Court and Cause.]

DOCKET ENTRIES

1952

Jan. 14—Filing Libel of Information. Issuing Monition. Certifying four copies for service.

Jan. 15—Filing Marshal's Returns. (Executed.)

Feb. 1—Filing Stipulation, 2-24-52.

Feb. 20—Filing Order. Filing Answer to Amended Libel of Information.

Feb. 26—Enter proceedings at hearing. Argument by respective counsel. The Court ruled that the Government does not have a case.

Mar. 5—Filing Order (Libel dismissed.) Machines ordered returned to claimants. (D. E. Metzger.)

Mar. 6—Filing Order (refused).

Mar. 10—Filing Judgment. Entered 4:10 p.m.; not gambling devices; not in vio. Pub. Law 906; ordered returned. (D. E. Metzger.)

Mar. 11—Filing Notice of Appeal to the United States Court of Appeals for the Ninth Circuit under Rule 73 (b). Copy of notice mailed to Counsel for Defendant.

Mar. 12—Filing Stay of Judgment.

May 9—Filing Designation of Record on Appeal.

May 13—Filing Reporter's Transcript of Proceedings. [27]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

In making up the transcript of the record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, please include the following:

1. Libel of Information, filed January 14, 1952.
2. Order amending Libel, filed February 20, 1952.
3. Answer to Amended Libel of Information.
4. Order filed March 5, 1952.
5. Order denying Libelant's proposed findings, filed March 6, 1952.
6. Order submitted to Court by Libelant and refused, filed March 6, 1952.
7. Judgment filed March 10, 1952.
8. Transcript of Proceedings had on February 26, 1952.

9. Clerk's Docket Entries.
10. Notice of Appeal.
11. This Designation of Record on Appeal.

Dated at Honolulu, T. H., this 9th day of May, 1952.

UNITED STATES OF AMERICA,
Libelant.

By /s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii, Attorney for Libelant.

[Endorsed]: Filed May 9, 1952. [29]

In the United States District Court for the
District of Hawaii
Civil No. 1123

UNITED STATES OF AMERICA,

Libelant,

vs.

TWELVE (12) Hollycrane "Digger" Type Coin-Operated Machines,

Respondent.

TRANSCRIPT OF PROCEEDINGS
February 26, 1952

Before: Hon. Delbert E. Metzger, Judge.

Appearances:

NAT RICHARDSON, JR.,
Asst. United States Attorney,
Appearing for the Libelant.

HERBERT K. H. LEE,
Appearing for the Respondent. [31]

Proceedings

The Clerk: Civil No. 1123, United States of America, Libellant, versus Twenty-one Hollycrane Digger Type Coin-Operated Machines, Respondent, case called for hearing.

Mr. Richardson: We are ready, if your Honor please.

Mr. Lee: We are ready, your Honor, and with the permission of the District Attorney's office I

would like to explain what the issue is before this Court.

It is an in rem proceeding against Twelve Machines called Hollycrane Machines. The issues of fact and law have been boiled down by the pleadings.

The information alleges that my clients are presently doing business as The Honolulu Amusement Company in Honolulu, and that they are the owners and possessors of these twelve machines which were being stored at the time of seizure. In——

By the way, those facts have been admitted by our answer.

It is also stated in the information that these machines were transported from the State of Illinois into the Territory of Hawaii since January 2nd, 1951, and these two parties, my clients, received these machines since January 2nd, 1951.

For the record the original libel of information was a proceeding against Twenty-one machines, but it was discovered later and by agreement of counsel an order was [32] entered, as I understand it, by the Court amending the libel to be presented against only twelve machines, the other nine having been shipped prior to January 2, 1951. These facts we admit.

Now, in paragraph III where the gist of the dispute comes in, the libel states that these twelve machines are mechanical devices designed and manufactured so that when operated they will deliver as a result of the application of an element of chance property. In other words, the information follows the language of the bill—not the bill actually the

public law involved, which contains that same language in the Act. In other words, "these machines are mechanical devices designed and manufactured in the State of Illinois so that when operated these machines will deliver, as the result of an application of an element of chance, property."

Our answer brings that question into focus. Our answer states as to paragraph III that these twelve Hollycrane machines when shipped from the State of Illinois "is not in violation of Public Law 906 of the 81st Congress because at the time of their transportation said machines had closed chutes fastened with explosive bolts making it physically impossible for said machines to deliver any money or property; that the said machines at the time of shipment and transportation were not gambling devices as defined in Public Law 906 [33] and, accordingly, are not subject to seizure, condemnation, forfeiture and disposition according to law."

The Court: The point is, as I get it, that the machines are not capable of delivering any property?

Mr. Lee: Yes, that is right. And I believe counsel, representing the District Attorney's office, is cognizant of that and has stated to me and is willing to state to the Court——

The Court: In other words, just a fraud?

Mr. Lee: No, I won't admit it is a fraud, your Honor. All we are concerned with at this moment, your Honor, is that these machines when transported from the State of Illinois, the chutes were closed, fastened with bolts so that it was physically impossible for these prizes to be delivered.

Mr. Richardson: We will stipulate, if your Honor

please, that there was a shield—I don't know whether you would call it a shield—but some enclosure over the chutes so that if some object was picked up inside the machine it would not come out. The machines were blocked at the time of transportation. They were in that condition.

Mr. Lee: That is correct, your Honor. That part, the record shows, is stipulated as far as our answer goes.

The Court: Yes.

Mr. Lee: It therefore becomes a question of law, [34] your Honor.

The Court: What is the law under which the seizure was made?

Mr. Lee: Public Law No. 906.

The Court: How does that read?

Mr. Lee: I have got the official copy.

The Court: Maybe we should hear from Mr. Richardson on that. What do you claim to be the authority?

Mr. Richardson: If your Honor please, Public Law 906, which is the recent Act prohibiting the interstate transportation of gambling devices, in Section (a) (2) sets out as follows:

"The term 'gambling device' means any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property."

If your Honor please, we insist that means the

fact that these machines were designed and manufactured to deliver property, and even though it was closed during the shipment, it still brings it under the Act; that the words "designed and manufactured" mean that the manufacturer of a machine intended it to be used or fit or suitable to be used in that sense, even though at the time of shipment the chute [35] was closed off.

I think that is the whole point in this lawsuit. The Act does not prohibit the transportation of a device capable of being used at that time as a gambling device. If it is designed and manufactured so that it may be used as a gambling device, it comes under the Act.

The Court: I am inclined to say, Mr. Richardson, that no matter if the machine, by some change, could be used as a machine of gambling or chance, if, in its manufacture and shipment, that was closed and sealed off so that the design of the manufacturer was that it couldn't be so used, I think that is it.

Mr. Richardson: If your Honor please, I will agree that during the time of shipment while that machine was coming over here it could not have been used in such a manner as to deliver property, but under the Act it says if it is designed or manufactured to operate—it doesn't have to be in condition at the time of shipment—if it is designed or manufactured so that it could operate after its arrival, the Act would cover it. If the Court please, I looked up——

The Court: You could take many implements,

perhaps a scale of balance and many other things, and turn them into a use for chance and gambling purposes.

Mr. Richardson: But they would have to be designed and manufactured for that use. This particular machine, the [36] only use it could possibly have is for a gambling device. There is no other use it could have.

The Court: It looks to me as though it was designed at the factory just as a swindle.

Mr. Richardson: Well, if your Honor please, that might be a gambling device.

Mr. Lee: May I assist the Court in this matter?

The Court: Go ahead. Now, I have got the other side of the picture.

Mr. Richardson: I would like to say this to the Court—excuse me, sir. I looked up in "Words and Phrases" and tried to get some definitions of the word, "design." I found two cases which may be close or may not. Anyway, it was defined as "design means intending or designated; also means appropriate, fit, prepared or suitable."

If this machine was prepared, fit or suitable for a gambling device after arrival, I think the Act would cover it, although agreeing with Mr. Lee at the time of transportation the chute was closed.

I found a Federal case, if the Court please, also defining gambling devices. This is Washington Coin Machine Association versus Callahan, 142 Federal Second, page 97. It is a case from the Circuit Court of Appeals of the District of Columbia. The machine involved in this particular case was one of

these pin-ball machines where they shoot [37] marbles around a board. That, of course, is not applicable here, but they define gambling devices in this case, and the Court says that it is obvious that crap table, lottery or bookkeeping are some form of gambling schemes or devices, but "to gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain, and the test as to whether a particular machine combination constitutes a gambling device is, as the 7th Circuit Court of Appeals said, whether it is adapted, devised and designed for the purpose of playing any game of chance for money or property."

In other words, if the Court please, if this machine was intended for use as a gambling device the Act prohibits transportation. That is the only thing this machine could be used for. There is no other game or anything else that could be played on it. And the fact that it was manufactured in the way it was would bring it under the Act.

The Act could have said very easily that the transportation of a machine capable of being used at that time is prohibited, but they didn't. They wrote the Act to prohibit the transportation of machines designed and manufactured to be used as a gambling device. That is our whole case right there.

Mr. Lee: May I answer there?

The Court: Go ahead. [38]

Mr. Lee: There are thousands upon thousands of cases involving the question of what machines may be said to be gambling devices under the State

cases and under cases involving risk, and there are cases which hold both ways. But you will find running along the entire stream of cases it depends on the particular case involved and the particular statute involved in the State.

Now, let us bear in mind as far as this proceeding is concerned, that this is what the government is alleging is a violation of a Federal Statute which prohibits transportation of gambling devices in interstate and foreign commerce. The history of this Bill reveals that it came about as the result of the recommendations of the Attorney General's conference on organized crime back in 1949-1950. Mr. McGrath headed that conference, and as a result of that conference all of the Attorney Generals drafted, got together and recommended a bill to be passed by Congress.

The main object of this bill was to assist the various states in the enforcement of gambling, and when this bill was submitted by the Attorney General's office—it was submitted to the Senate at first and there were witnesses pro and con.

Now, the record shows—and I have the report of the proceedings here—shows that witnesses at the Bill's hearing before the Senate Committee of Interstate and Foreign [39] commerce criticized the bill because the definition of gambling device was so broad as to cover many types of mechanical devices not manufactured or normally used for gambling purposes. In reporting the bill out favorably the Committee felt that the Federal Government should extend to states a system—assistance in strengthening the state and local law enforcement.

On the other hand, the Committee emphasized that Federal law enforcement in the field of gambling cannot and should not be considered a substitute for state and local law enforcement in the field.

It made this comment that whether gambling flourishes in that particular community depended on the local enforcement agency.

Now, the bill was passed by the Senate in the form drafted by the Attorney General's conference. When the Senate version of the bill was heard before the Committee on Interstate and Foreign commerce of the House, the House report stated the following:

"The only thing that the Federal Government is being asked to do under this bill is to stop in the channels of interstate commerce the shipment of these machines which the states are powerless to keep out of the channels of interstate commerce."

The bill, as passed by the Senate, contained the following definition of gambling device—and this is the [40] answer to the contention of the government. The bill, as passed by the Senate, contained the following definition of gambling device. I quote:

"Any machine or gambling device or parts thereof designed or adapted"—these are the words used by the government attorney—"or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive directly or indirectly anything of value."

And the report goes on to answer this definition. In their testimony before the Committee the At-

torney General stated that this definition—in other words, they admitted—this definition could possibly be construed to include pinball machines and similar devices which are played purely for amusement and which do not have pay-off devices which returned to the player anything of value.

In his communication addressed to the chairman of the committee dated June 1st, 1950, the Attorney General's representative pointed out, however, that it was the intention of the Department of Justice that machines manufactured and used purely for amusement should be excluded from the provisions of this bill. In view of this testimony because of its intention to exclude pinball machines and similar amusement machines as well as certain machines and devices commonly used, for instance, at carnivals and livestock shows, your [41] committee decided to adopt a definition of gambling device different from the one contained in the Senate bill.

Gambling device is defined by the committee amendment as now contained in Public Law 126 and was—watch the difference between the Senate and the House version. The House version now defines gambling device as any machine or mechanical device designed and manufactured—instead of designed and adapted—to operate by means of insertion of a coin, token or similar object and designed and manufactured so that when operated it may deliver as the result of the application of an element of chance any money or property.

And I also want to state to the Court that the manufacturing company at the time the respond-

ents here purchased the machines offered three models of these machines, one of which would have fitted into the definition of this bill. These three models are as follows:

1. The standard model with an open chute. In other words, instead of a closed chute, it is an open chute, so that the property can be delivered to the player. This model gives the player the opportunity to take the prize out of the door in front of the machine. Now, that would be that type of machine, but by stipulation with the District Attorney's office, the machine involved is the second type. It is called the closed chute model.

This model operates as follows: [42]

The player does not get the prize as the front door is closed. Now, this is the type of machine. And the third type is the three-play model. This also has a closed chute and the player does not get the prize. There are three types of machine. This is the second type of machine, which makes it physically impossible to get the prize because the chute or the opening of the machine must be open before the prize can come out.

Now, it is said by the attorney for the government what were these machines intended for, that it was meant to cover any type of machine that was intended to be used as a gambling device. We all know that a pinball machine can be used for amusement and so can these machines, because the claws of these machines could pick up prizes and if it picks up prizes you can have some form of amusement.

It all depends on how, after the machine has arrived in a state, how it is altered, how it is adapted so that when operated it would be given an element of chance so that property could be delivered.

These machines here, your Honor, could be altered, in other words, by opening the chute, and on some of these machines these chutes have been opened, and actually under this definition it would be gambling device, but the Federal law does not seek to regulate within the states; it only seeks to regulate against the transportation of these machines. [43]

In other words, if these machines had an open chute and were transported from the state of Illinois to Honolulu, I would say those machines would come under this definition of the Federal law, but that isn't the case here. The machines were transported with closed chutes so that it was physically impossible to have the third element which is necessary to constitute a gambling device, which is the matter of delivering property. It couldn't deliver property. The only way it could deliver property, it would have to be changed within the state or territory, and that is not the purpose of this bill as stated in the report of the House Committee.

When this bill was being proposed, the purpose of this bill, I repeat, is to assist the states in the enforcement in the fields of gambling. On the other hand, the Committee emphasized the Federal law enforcement in the field of gambling cannot and should not be considered a substitute for state and local law enforcement in the field. And I state,

your Honor, that under this clear application of the facts to the law involved here, that these machines when transported from the state of Illinois into the Territory of Hawaii were not gambling devices and therefore the shipment was not illegal.

The Court: Well, suppose they manufactured a faro wheel in one state. The manufacturer made a puka in the [44] bottom of each cup so that it could hold a marble. Therefore, it could be used for gambling purposes in that state in that condition. But the recipient of the machine in another state could easily put plugs that might be furnished to him and devised by himself in these holes of the faro wheel. Would or would not that be a shipment, would it not be a violation of that law, Mr. Lee?

Mr. Lee: I didn't quite get the facts.

Mr. Richardson: I think I did, if your Honor please. That would be a machine designed and intended just exactly as these things are. As a matter of fact, if the Court please, there is a case, a state case, an Alabama case, which I also found. I didn't bring it into Court, but it holds that a shipment of a part of the roulette wheel, not the whole thing, was a gambling device. Give me five minutes.

The Court: I said faro, I meant roulette, that is what I meant to be talking about. Faro is a card game. I am not so very familiar with gambling or gambling devices, but it was a roulette wheel I had in mind for I have seen them.

It takes two combinations to make them work. One would be the marble, and without the marble you couldn't do any gambling.

Mr. Lee: That is right.

The Court: If the manufacturer sent just [45] the machine without the marble, would he be transporting a gambling machine?

Mr. Richardson: He would be transporting one if it was designed and manufactured to be used as a gambling machine.

Mr. Lee: Are you talking about a roulette wheel or faro wheel?

The Court: No, not faro. Faro is a card game. I misused that.

Mr. Lee: You are talking about a roulette wheel?

The Court: Yes.

Mr. Lee: I might even go so far as to point out the distinction between shipment of a part of a roulette wheel which is very clearly the type of a machine which is intended for gambling as being one example, and yet I can think of other types of roulette wheels which may not be a gambling device.

For instance, they have these little games they ship here used by the schools and by the children. It is a cardboard, and they have so many buttons in which you can play among yourselves or in the family. It is a family type of thing. In my mind that type of a roulette part or assembly is not a gambling device, while the ones in the regular type of a roulette wheel which is used in houses of gambling, that is a professional type. I think the [46] Court knows what I am talking about, a professional type.

The Court: I do.

Mr. Lee: That would be considered a gambling device. But again, I point out these machines are

Hollycrane machines. They are claw machines. For instance, if they were slot machines, that is a different story. You can see they would be intended and designed and manufactured for gambling, but these machines with closed chutes are designed and manufactured so that you couldn't deliver, when operated, any property. That type of machine is not the type of machine that is covered under this Act, whereas the type of machine which has an open chute, those type of machines are designed and manufactured to be used for gambling devices. And that is the distinction between this case and the other type of case.

Mr. Richardson: When that chute was removed, if your Honor please, after the machines got here, as I understand some of them were, then that machine was capable of enjoying the function for which it was designed and manufactured. That is the only function that it is capable of being used for, for which it was designed and manufactured. And the fact that it was closed while it was in the process of transportation still brings it under the Act because it is, nevertheless, a machine designed and manufactured for use as a gambling device. [47]

Mr. Lee: Now, if your Honor please, from counsel's remarks one has the impression that these closed chutes is just something that you unfasten and you can open. That isn't the case. These fasten with explosive bolts. You can't open it. It is physically impossible. You have to use an electric drill, which requires a complete alteration of the machine before it can be used as stated by the government.

Mr. Richardson: I understand some of them were removed, though.

Mr. Lee: Oh, yes; but it has to be done by a process which is not normal for that type of machine.

Mr. Richardson: I will agree they were all sealed.

Mr. Lee: By explosive bolts.

The Court: This is my view: the machines as they arrive here, being not capable of delivering any merchandise, they are outside of the Act. If, after their arrival, they are, by any alteration made in the mechanism or structure, turned into machines that are within the Act, they should be proceeded against and confiscated.

Mr. Richardson: If your Honor please, we can't do that.

The Court: Perhaps that is so. It would be a matter for the local authorities. I think that would be so. [48] They didn't cross the state line in that condition and they would have to be altered. But that is the view I take, Mr. Richardson. I think that Act didn't foresee far enough, and the manufacturers beat them to the rap. It looks like that to me.

Mr. Richardson: Yes, sir.

The Court: Some Courts might take a different view, but that is mine.

Mr. Richardson: If the Court please, I think this is a new question. As your Honor knows, this is a new law. It hasn't been in effect very long. I

don't even know if it has been passed any other place. It is rather a new question to us out here.

The Court: I think it ought to be tightened up to meet a situation like this. If the government still believes in the general design and intent that machine was intended as a chance to deliver merchandise to the lucky player, that would be gambling I suppose in any definition. But as it stands now, I don't believe you have a case.

Mr. Richardson: All right, sir.

Mr. Lee: Thank you, your Honor.

(Court adjourned at 10:45 o'clock a.m.) [49]

Reporter's Certificate

I, Mary V. Totushek, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings reported by me in Civil No. 1123, United States of America vs. Twelve (12) Hollycrane "digger" type coin-operated machines, held in the above-named court on February 26, 1952, before the Hon. Delbert E. Metzger, Judge.

May 9, 1952.

/s/ MARY V. TOTUSHEK. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United

States District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause consists of a statement of the names and addresses of the attorneys of record, and of the various pleadings, transcript of proceedings, and other papers as hereinbelow listed; that all of said pleadings, transcript of proceedings and other papers consists of original papers filed in my office and are accompanied by this certificate and that the pages of the certified record at which said pleadings, transcript of proceedings and other papers appear are as hereinbelow indicated:

Original Papers

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said Court this 21st day of May, A.D. 1952.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of Hawaii. [52]

[Endorsed]: No. 13398. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Tamotsu Fujisaki and Raymond C. L. Cheong, Owners of Twelve (12) Hollycrane "Digger" Type Coin-Operated Machines, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed May 26, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Libellant-Appellant,

vs.

TWELVE (12) Hollycrane "Digger" Type Coin-Operated Machines,
Respondent-Appellee.

STATEMENT OF POINTS TO BE RELIED UPON BY LIBELANT-APPELLANT ON APPEAL

Comes now the United States of America, Appellant in the above-entitled cause, by Howard K. Hoddick, Acting United States Attorney for the District of Hawaii, and, pursuant to the provisions of Rule 19 (6) of the Rules of Practice for the United States Court of Appeals for the Ninth Circuit, hereby states that the Appellant, in taking this appeal, relies upon the following:

1. The judgment of the United States District Court for the District of Hawaii, entered and filed on March 10, 1952, decreeing that the respondent-appellee property consisting of twelve Hollycrane Machines bearing serial numbers: 1525-30, 1526-30, 1528-30, 1529-30, 1530-30, 1459-30, 1460-30, 1461-30, 1462-30, 1463-30, 1466-30 and 1468-30, were not gambling devices at the time of their shipment from the State of Illinois to the Territory of Hawaii, and that said shipment was not in violation of Public

Law 906, Sections 1171-1177, Title 15, United States Code, is contrary to law and to the evidence, in that respondent-appellee property at the time of said shipment fell within the definition of the term "gambling device" as used in Section 1171 (a), Title 15, United States Code, and that consequently the shipment of respondent-appellee property was in violation of Section 1172, Title 15, United States Code, and was subject to confiscation and forfeiture under the provisions of Section 1177, Title 15, United States Code.

By reason of said error, the judgment directing the return of respondent-appellee property to Tamotsu Fujisaki and Raymond C. L. Cheong should be reversed.

Dated at Honolulu, T. H., this 9th day of May, 1952.

/s/ HOWARD K. HODDICK,

Acting United States Attorney, District of Hawaii, Attorney for Appellant.

[Endorsed]: Filed May 26, 1952.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED ON APPEAL

Comes now the United States of America, Appellant in the above-entitled cause, by Howard K. Hoddick, Acting United States Attorney for the

District of Hawaii, and hereby designates for inclusion in the printed record on appeal, the following:

1. Libel of Information, filed January 14, 1952.
2. Order Amending Libel, filed February 20, 1952.
3. Answer to Amended Libel of Information.
4. Order filed March 5, 1952.
5. Order denying Libelant's proposed findings, filed March 6, 1952.
6. Order submitted to Court by Libelant and refused, filed March 6, 1952.
7. Judgment filed March 10, 1952.
8. Transcript of Proceedings had on February 26, 1952.
9. Clerk's Docket Entries.
10. Notice of Appeal.
11. Statement of Points to Be Relied Upon by Appellant.
12. Designation of Record on Appeal.
13. This Designation of Record to Be Printed on Appeal.

Dated at Honolulu, T. H., this 9th day of May, 1952.

/s/ HOWARD K. HODDICK,
Acting United States Attorney, District of Hawaii,
Attorney for Libelant.

[Endorsed]: Filed May 26, 1952.

No. 13400

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13400

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

A. NORMAN SOMERS,
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Washington D. C.,

For Petitioners, National Labor Relations Board.

MESSRS. BROBECK, PHLEGER & HARRISON By,

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For Respondent, Westinghouse Electric Corp.

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Grand Lodge Representative,

306 Pacific Bldg.,
Oakland 12, Calif.,

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PLATO E. PAPPS,

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For Respondent Union, International Association of Machinists, Local No. 504.

United States of America
Before the National Labor Relations Board

Twentieth Region

Case No. 20-CA-328

In the Matter of

WESTINGHOUSE ELECTRIC CORPORATION

and

CLYDE W. SCHEUERMANN, an Individual.

Case No. 20-CB-102

In the Matter of

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504

and

CLYDE W. SCHEUERMANN, an Individual.

CONSOLIDATED COMPLAINT

It having been charged by Clyde W. Scheuermann, an individual, herein called Scheuermann, that Westinghouse Electric Corporation and International Association of Machinists, Local No. 504, herein called respectively Westinghouse and Union and collectively Respondents, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et

seq. (Supp. July 1947) herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 5, as amended, Section 203.15, hereby issues his Complaint upon the charges, duly consolidated, pursuant to the provisions of Section 203.33 (b) of the above Rules and Regulations and alleges as follows:

I.

Westinghouse is a Pennsylvania corporation with its principal office at Pittsburgh, Pennsylvania. It operates plants throughout the United States, including a plant at Sunnyvale, California. At the Sunnyvale plant, Westinghouse manufactures electrical and steam equipment, including turbines, transformers, and switch gear. In 1948, Westinghouse purchased for its Sunnyvale plant sheet metal, wire, insulation material, castings, ball bearings, oil, and other materials and supplies valued in excess of $1,000,000.00, of which approximately 50 per cent was shipped to its Sunnyvale plant from points outside California. In 1948, Westinghouse sales from its Sunnyvale plant exceeded $8,000,000.00, of which approximately 50 per cent was shipped from its Sunnyvale plant to points outside of California.

II.

International Association of Machinists, Local No. 504, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

III.

Until on or about November 11, 1949, Scheuermann was employed by Westinghouse as a mechanic.

IV.

On or about November 11, 1949, the Union caused Westinghouse to discharge Scheuermann, by requesting such discharge pursuant to the terms of its collective bargaining agreement with Westinghouse, although the Union had previously terminated Scheuermann's membership for reasons other than non-payment of dues or membership fees.

V.

On or about November 11, 1949, Westinghouse discharged Scheuermann for non-membership in the Union, although Westinghouse had reasonable grounds for believing that membership in the Union had been terminated for reasons other than non-payment of dues or initiation fees.

VI.

By the act set forth in paragraph IV above, the Union did cause, and is causing, Westinghouse to discriminate against Scheuermann in violation of Section 8(a)(3) of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(b)(2) of the Act.

VII.

By the acts set forth in paragraph IV above, the Union did restrain or coerce, and is restraining or

coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

VIII.

By the acts set forth in paragraph V above, Westinghouse did discriminate, and is now discriminating, in regard to the hire and tenure of employment and the terms and conditions of employment of Scheuermann, thereby encouraging membership in the Union and discouraging membership in other labor organizations, and did thereby engage in, and is now thereby engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

IX.

By the acts set forth in paragraph V above, Westinghouse did interfere with, restrain and coerce, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

X.

The acts of Respondents as set forth in paragraphs IV and V above, occurring in connection with the operations of Westinghouse described in paragraph I above, have a close, intimate and substantial relation to trade, traffic and commerce

among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XI.

The aforesaid acts of Westinghouse as set forth in paragraph V above, and the aforesaid acts of the Union as set forth in paragraph IV above, and each of them, constitute unfair labor practices within the meaning of Section 8(a)(1) and (3), and Section 8(b)(1) (A) and 8(b)(2), and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 8th day of June, 1950, issues his Consolidated Complaint against Westinghouse Electric Corporation and International Association of Machinists, Local No. 504, Respondents herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, National Labor Relations Board,
821 Market Street, San Francisco 3, California.

Received in evidence as General Counsel's Exhibit No. 1-G, September 5, 1950.

United States of America
Before the National Labor Relations Board
Twentieth Region

[Title of Causes.]

ANSWER OF WESTINGHOUSE ELECTRIC CORPORATION TO CONSOLIDATED COMPLAINT

Comes now respondent Westinghouse Electric Corporation, a corporation, and, in answer to the Consolidated Complaint on file in the above-entitled matters, admits, denies and alleges as follows:

I.

Answering paragraphs IV, V, VI, VII, VIII, IX, X and XI of the Consolidated Complaint, respondent Westinghouse Electric Corporation denies generally and specifically each and every, all and singular, the allegations contained in said paragraphs.

As and for a second and further defense respondent Westinghouse Electric Corporation alleges:

I.

Prior to the 10th day of October, 1949, Westinghouse Electric Corporation negotiated a collective bargaining agreement with International Association of Machinists, District Lodge 93, Local 504, which said agreement was executed on the 10th day of October, 1949. A copy of said agreement is attached hereto, marked Exhibit "A" and by this reference made a part hereof. Said Collective bar-

gaining agreement was entered pursuant to the certification of the aforesaid union by the National Labor Relations Board on or about July 19, 1949, in Consolidated Cases. Nos. 20-RM-31, 20-RM-33, and 20-RC-473, and the certification of the said Board on or about September 7, 1949, in case No. 20-UA-1943, permitting the execution of the union shop agreement. The said agreement applied to the employment of Clyde W. Scheuermann, the Charging Individual herein.

II.

On or about November 11, 1949, the above union requested that the said Clyde W. Scheurmann, be dicharged pursuant to the terms of the aforesaid agreement on the ground that he had failed to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring and retaining membership in said union. Mr. Scheurmann was discharged pursuant to the terms of the aforesaid collective bargaining agreement and pursuant to the said request.

Wherefore, respondent Westinghouse Electric Corporation Prays That the complaint against it be dismissed.

/s/ BROBECK, PHLEGER & HARRISON,

Attorneys for Respondent Westinghouse Electric Corporation.

Duly verified.

Received in evidence as General Counsel's Exhibit No. 1-J, September 5, 1950.

United States of America
Before the National Labor Relations Board
Twentieth Region

[Title of Causes.]

RESPONDENT UNION'S ANSWER TO CONSOLIDATED COMPLAINT

Comes now the International Association of Machinists, Local Lodge No. 504, herein called Respondent Union, and in answer to the consolidated Complaint issued under date of June 8, 1950, admits, denies and alleges as follows:

I.

The facts concerning this item are unknown to Respondent Union. This section of the Complaint should be answered by Respondent Company.

II.

Respondent Union admits that it is a labor organization within the meaning of Section 2, subsection (5) of the Act.

III.

Respondent Union admits that Scheuermann ceased to be an employee of Westinghouse at its Sunnyvale Plant on or about November 11, 1949.

IV.

Respondent Union admits that it requested the termination of Clyde W. Scheuermann and others on or about November 11, 1949, for failure to comply with Section 2 of its agreement with Westing-

house. Respondent Union also admits that it had, in accordance with its laws, tried and expelled Clyde W. Scheuermann for good cause prior to certification by the Board on July 19, 1949, in Case No. 20-RC-473.

V.

Respondent Union states that it is without knowledge as to the reasons or decisive factors motivating Westinghouse in making its decision to terminate Clyde W. Scheurermann, and it knows still less about the extent of the Employer's knowledge concerning the relationship of Scheuermann to Respondent Union.

VI.

Respondent Union denies each and every allegation, and each and every conclusion in paragraph VI of the Complaint that either it or Respondent Company is or has, because of the allegations in paragraph IV of the Complaint, violated Section 8 (a) (3) or Section 8 (b) (2) of the Act.

VII.

Respondent Union denies that it has in any way violated Section 8 (b) (1) (A) of the Act.

VIII.

Respondent Union denies that the allegations of paragraph V of the Complaint, even if true, constitute a violation of Section 8 (a) (3) by Respondent Company.

IX.

Respondent Union denies that the allegations of paragraph V of the Complaint, even if true, constitute a violation of Section 8 (a) (1) by Respondent Company.

X.

Respondent Union believes that the Westinghouse Electric Corporation including the business of its Sunnyvale Plant is within the jurisdiction of the National Labor Relations Board, however, Respondent Union denies that the allegations of paragraphs IV and V of the Complaint, even if true, have a close, intimate and substantial relation to trade, traffic and commerce, or that those acts tend to lead to labor disputes burdening and obstructing commerce or the free flow of commerce.

XI.

Respondent Union denies that any act alleged in the Complaint constitutes an unfair labor practice or a violation of any section of the Act regardless of whether the act is true or false, or whether the act was by Respondent Union or Respondent Company.

Dated at Oakland, California, July 12, 1950.

INTERNATIONAL ASSOCIATION OF MACHINISTS

/s/ A. C. McGRAW,

Grand Lodge Representative for and in Behalf of Local Lodge No. 504.

State of California,
County of Alameda—ss.

Subscribed and sworn to before me Marie E. Alves, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, on this 12th day of July, 1950, at Oakland, Calif.

[Seal] /s/ MARIE E. ALVES,

Notary Public in and for the County of Alameda, State of California.

My Commmission expires July 2, 1953.

Received July 14, 1950.

Received in evidence as General Counsel's Exhibit No. 1-K, September 5, 1950.

Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Case No. 20-CA-328

In the Matter of

WESTINGHOUSE ELECTRIC CORPORATION (SUNNYVALE PLANT)

and

CLYDE W. SCHEUERMANN, an Individual.

Case No. 20-CB-102

In the Matter of

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504

and

CLYDE W. SCHEUERMANN, an Individual.

HARRY BAMFORD, ESQ.,
For the General Counsel.

BROBECK, PHLEGER & HARRISON, by
SAMUEL L. HOLMES, ESQ.,
Of San Francisco, Calif.,
For the Respondent Company.

A. C. McGRAW, ESQ.,
Of Oakland, Calif.,
For the Respondent Union.

CLYDE W. SCHEUERMANN, ESQ.,
Of Alma, Calif.,
Pro se.

Before: Frederic B. Parkes, II, Trial Examiner.

INTERMEDIATE REPORT

Statement of the Case

Upon charges duly filed by Clyde W. Scheuermann, herein called the Complainant, the General Counsel of the National Labor Relations Board,[1] by the Regional Director of the Twentieth Region (San Francisco, California), issued his consolidated complaint dated June 8, 1950, against Westinghouse Electric Corporation, (Sunnyvale Plant), herein referred to as the Respondent Company,[2] and against International Association of Machinists, Local No. 504, herein called the Respondent Union,[3] alleging that the Respondent Company had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, and that the Respondent Union had engaged and was engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and 8 (b) (2) and Section 2 (6) and (7) of the Act. Copies of the charges, complaint, and

[1]The General Counsel and his representative at the hearing are referred to as the General Counsel. The National Labor Relations Board is herein called the Board.

[2]The name of the Respondent Company appears herein in accordance with an amendment to the pleadings, granted during the course of the hearing, to set forth the correct name of the Respondent Company.

[3]The Respondent Company and the Respondent Union are at times collectively referred to herein as the Respondents.

notice of hearing were duly served upon the Respondent Company, the Respondent Union, and the Complainant.

With respect to the unfair labor practices, the consolidated complaint, as amended during the course of the hearing,[4] alleged that (1) on or about September 9, 1949, during the course of negotiations leading up to a new collective bargaining contract, the Respondent Union attempted to cause the Respondent Company to discharge employees Floyd King, Charles V. Pachorik, and Clyde Scheuermann, and did cause the Respondent Company to discharge employee John Marovich, by requesting such discharges because they had expressed a preference for Independent Westinghouse Workers Union, herein called the IWWU, or had criticized the Respondent Union; (2) on or about November 11, 1949, the Respondent Union caused the Respondent Company to discharge Clyde Scheuermann, by requesting such discharge pursuant to the terms of the Respondents' collective bargaining agreement, although the Respondent Union had previously terminated the membership of and denied membership to Scheuermann for reasons other than the nonpayment of dues or initiation fees; (3) on or about September 20, 1949, the Respondent Company discharged Marovich pursuant to the request of the Respondent Union; and (4) on or about

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[4]On September 8, 1950, during the course of the hearing, the undersigned granted a motion of the General Counsel to amend the complaint. The principal matters covered by these amendments related to the allegations in respect to the Respondent Union's attempt on September 9, 1949, to cause the Respondent Company to discharge King,

November 11, 1949, the Respondent Company discharged Scheuermann for nonmembership in the Respondent Union, although the Respondent Company had reasonable grounds for believing that his membership in the Respondent Union had been terminated and denied for reasons other than nonpayment of dues or initiation fees. The complaint further alleged that by the foregoing conduct, the Respondent Company has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act and the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and 8 (b) (2) and Section 2 (6) and (7) of the Act.

Each of the Respondents duly filed an answer, amended during the course of the hearing to cover the additional matters brought in issue by amendments to the original complaint, denying that either of them had engaged in any of the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held from August 29, 1950,[5] to September 20, 1950, at San Fran-

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Pachorik, Scheuermann, and Marovich and the Respondent Company's discharge of Marovich on September 20, 1949. The complaint was also amended in minor respects not detailed herein.

[5]On February 27, 1941, the undersigned issued an order correcting the transcript to show that the hearing opened on August 29, 1950, and not August 23, 1950, and that on September 1, 1950, the undersigned granted on the record a motion made by the General Counsel with the concurrence of the other parties that the hearing be continued until September 5, 1950.

cisco and Sunnyvale, California, before Frederic B. Parkes, 2nd, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Respondent Company were represented by counsel and the Respondent Union by an official representative. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the conclusion of the General Counsel's case in chief, the Respondent Company moved that the complaint be dismissed in its entirety or in the alternative that the complaint's allegations in regard to Marovich be dismissed. At the same time, the Respondent Union moved that the complaint be dismissed in its entirety and urged various alternate motions for dismissal of certain allegations of the complaint. The undersigned denied these motions. At the conclusion of the hearing, the motion of the General Counsel that the pleadings be conformed to the proof in respect to minor variances such as names and dates was granted. At the same time, the motions of the Respondents that the complaint be dismissed were renewed and ruling thereon was reserved. Those motions are disposed of in accordance with the findings of fact and conclusions of law made below.

Upon the conclusion of the hearing, the undersigned advised the parties that they might argue before, and file briefs or proposed findings of fact and conclusions of law, or both, with the Trial Examiner. The Respondents waived oral argument but briefly stated their positions in argument on the

renewal of their motions to dismiss the complaint. The General Counsel engaged in oral argument. The Respondent Company, the Respondent Union, and the General Counsel each filed a brief with the undersigned.

Pursuant to application duly made and arrangements mutually agreeable to all parties, the testimony of Earl B. Scott was taken by deposition on September 25, 1950, and it is hereby incorporated into the record of the instant proceeding.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the Respondent Company

Westinghouse Electric Corporation, a Pennsylvania corporation with its principal office at Pittsburgh, Pennsylvania, operates plants throughout the United States, including a plant at Sunnyvale, California. At its Sunnyvale plant, the Respondent Company manufactures electrical and steam equipment, including turbines, transformers, and switch gear. In 1948 and 1949, it purchased for its Sunnyvale plant sheet metal, wire, insulation material, castings, ball bearings, oil, and other materials and supplies valued annually in excess of $1,000,000, of which approximately 50 per cent was shipped to its Sunnyvale plant from points outside the State of California. In 1948 and 1949, the Respondent Company's sales from its Sunnyvale plant exceeded $8,000,000 annually, of which approximately 50 per cent was shipped from its Sunnyvale plant to points outside the State of California.

II. The labor organization involved

International Association of Machinists, Local No. 504, is a labor organization admitting employees of the Respondent Company to membership.

III. The alleged unfair labor practices

A. Sequence of events through September, 1949

1. Collective bargaining histroy; the elections

On March 1, 1947, the Respondent Company assumed ownership of its Sunnyvale plant, which theretofore had been owned and operated by Joshua Hendy Iron Works. For a number of years prior thereto, the latter had had collective bargaining contracts, with closed-shop provisions, with the Respondent Union or its predecessor. On May 14, 1947, the Respondents executed a collective bargaining contract for a term beginning May, 5, 1947, to, and including, March 31, 1949, and thereafter for successive annual periods unless otherwise terminated. This contract also contained closed-shop provisions.

In February, 1949, Independent Westinghouse Workers Union, herein called the IWWU, was formed and launched an organizational campaign among the Respondent Company's employees. Clyde Scheuerman was president of the IWWU and in March, 1949, upon charges of dual unionism was tried, finded, and expelled from membership in the Respondent Union. In May, 1949, he was informed that the International Association of Machinists had approved the action taken in respect to him by the Respondent Union.

Meanwhile, the contract between the Respondents expired on April 1, 1949. On June 13, 1949, the Board issued its Decision and Direction of Elections, directing that elections be conducted among three voting groups of the Respondent Company's employees.[6] The employees in one voting group were to determine whether they desired to be represented for the purposes of collective bargaining by the Respondent Union or the IWWU. The Respondent Union won the election in the voting group in which it participated and was certified as the statutory representative of such employees on July 19, 1949. After the election, the IWWU was disbanded. Pursuant to a consent election agreement, the Regional Director, on August 25, 1949, conducted a union-shop authorization election among the employees in the bargaining unit for which the Respondent Union was the statutory representative. A majority of the eligible voters authorized the Respondent Union to negotiate a union-security agreement and a certificate of the results of the election was issued on September 7, 1949.

2. The alleged discrimination in September, 1949, in respect to King, Pachorik, Marovich, and Scheuerman

a. The testimony of Chloe Andersen

Andersen testified as follows with respect to a meeting held in the office of Mechanical Superin-

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[6]Westinghouse Electric Corporation, 84 NLRB 213.

tendent John J. McAuliffe on September 9, 1949: Anderson, in 1949, was employed by the Respondent Company as a copy typist. When McAuliffe's secretary, Louella Walter, took a vacation from September 2 through September 16, 1949, Andersen assumed her position as secretary for McAuliffe, and during that period, occupied an "ante room office" adjacent to that of McAuliffe. On September 9, 1949, McAuliffe was ill and not at work. On that afternoon, a meeting was held in McAuliffe's office in his absence and was attended by a group of the Respondent Company's supervisors, including B. H. Goodenough, manager of industrial relations for the Respondent Company; Assistant Superintendent Herbert C. Buckingham; Tool Supervisor W. H. Harrison; Foreman Thomas P. Shields; and possibly "one or two more supervisors," as well as Franklin W. Gorham, assistant business agent for the Respondent Union.

According to Andersen, the door between her office and that of McAuliffe was left open and she overheard the ensuing discussion among the participants in the conference. Goodenough seemed to be in charge of the meeting and opened it by saying, "Mr. Gorham has come in to say a few words." Thereupon Gorham said, "Now that the contract is pretty well buttoned up, I have a list of names of men that I want you to get rid of * * * Floyd King, Johnnie Marovich, Clyde Scheuermann, and a man named Pachorik." In respect to King, Gorham said, "He was the worst union member he had ever come in contact with; he wasn't fit to belong to any

union'' and furthermore remonstrated, ''You not only did not discharge him, but you let him be transferred to the Maintenance Department, where he got a raise in pay.'' At that point, about 5 minutes after the beginning of the meeting, Gorham left. The supervisors remained and discussed his requests.

Goodenough said, ''I don't know how you boys feel about this, but I know that Mr. Gorham is only worried about Mr. Gorham. That is, he has been a pretty good boy when it came to signing this contract and I think this is the least we can do for him.''

Foreman Shields stated, ''I want to see Johnnie Marovich the first one off that list.'' Whereupon one of the other supervisors reminded Shields that ''Marovich had a lot of seniority.'' Shields pointed out that Marovich had recently ''spoiled a good percentage of material that cost several thousands of dollars and he knew he could get him on that, if nothing else.''

Harrison ''wanted to know how they would get Floyd King. He had a lot of seniority in his department and he didn't see how he could terminate him.'' Goodenough countered, ''Well, there must be something he can't do.'' Harrision replied, ''That is just it, there isn't anything he can't do.''

The discussion turned to Pachorik, and Buckingham remarked that ''Pachorik had about twenty-five years' service with the company * * * I feel that any man who has been able to stay with the company for twenty-five years must have some good

qualities and if you don't want him, transfer him to my department. I could use him."

Buckingham then asked, "What are we going to do about Scheuerman?" When it was pointed out that Scheuermann was in Buckingham's department, Buckingham said, "Well, if one goes in my department they are all going. There won't be any seniority to quibble about." At that point, the meeting adjourned.

That evening Andersen related the occurrences of the meeting to Scheuermann and Leslie Ollis, who were the principal witnesses for the General Counsel in the presentation of Scheuermann's case. Andersen, Scheuermann, and Ollis were personal friends and their homes were relatively near each other in the same small community, Redwood Estates.

b. Testimony of the Respondents' witnesses as to the conference in McAuliffe's office in September, 1949.

Industrial Relations Manager Goodenough, Assistant Superintendent Buckingham, Tool Supervisor Harrison, Foreman Shields, Foreman Sheldon Huffman, and Electrical Superintendent Kermit Clark, who were witnesses for the Respondent Company, and Business Agent Gorham and Chief Shop Steward Carl Schwartz, who were witnesses for the Respondent Union, testified that they attended a conference in McAuliffe's office on a day when McAuliffe was not at work and that only one such meeting in which they all participated was held.

Several testified that the meeting was held in September, 1949; others stated that it was in the fall or latter part of 1949. As noted above, Andersen fixed the day on which the meeting was held as September 9, 1949. That day is a State holiday, commemorating California's admission to the United States. Buckingham recalled that on September 9, 1949, he and a foreman left the Respondent Company's plant about 10:30 or 11 a.m. in order to witness a parade in nearby San Jose, California, and that they returned to the plant about 1 or 1:30 p.m. According to Buckingham, he never absented himself from the plant on those occasions when he was assuming the duties of Mechanical Superintendent McAuliffe. Inasmuch as McAuliffe was ill and not at work on the day the meeting in question was held, Buckingham reasoned that it could not have been held on September 9, 1949, the day on which he witnessed the parade during working hours.

Business Agent Gorham testified that on September 9, 1949, he spent most of the day in his office at San Jose, being unable to take his automobile from a parking lot because of a parade and other celebrations which blocked the streets near his office. He testified that he left the office only once in the afternoon of September 9, 1949, in order to discuss a grievance with the General Electric Company, and denied that he was at the Respondent Company's Sunnyvale plant on that date. According to Gorham, the meeting in question was held on September 6, 1949. Schwartz testified that the con-

ference occurred on the day he returned from vacation, September 6, 1949, the day after Labor Day.

The record establishes that the meeting in question was held during a period of production and employment curtailment on the part of the Respondent Company. In March, 1949, the number of hourly paid employees in the Respondent Company's employ reached a maximum of 1,956. By July, 1949, the number of employees had decreased to approximately 1,400. In December, 1949, there were 872 employees. The reduction in force was general in scope, affecting all departments of the plant.

A synthesis of the mutually corroborative and reconcilable testimony of the testimony of the eight witnesses for the Respondents named above, in respect to the September conference is as follows:

The conference was called by Buckingham to discuss a problem arising from lack of work in the welding department, supervised by Foreman Huffman. Due to the fact that parts had not arrived from a supplier, there was insufficient work for these welders, who at that time were on a work week of 32 hours rather than the customary 40 hours. Various suggested solutions to the problem were discussed: (1) Layoff of some of these welders and their comparative seniority; (2) further reduction in the number of hours of the work week; and (3) transfer of some of them to the electrical division under Superintendent Clark and Foreman Emil Ghiorso, who were also in attendance at the

meeting. Assistant Business Agent Gorham and Chief Shop Steward Schwartz[7] were present during the first portion of the conference when the problem concerning welders was being discussed. Gorham suggested that a staggered work week be inaugurated; that is, the full complement of welders then in the employ of the mechanical division should be retained but should work alternate weeks, thereby permitting them to draw State unemployment insurance during the weeks they were not employed. Gorham's suggestion was rejected. According to Goodenough and Huffman, the ultimate decision, reached either at this meeting or shortly thereafter, was to retain the welders but to reduce their work week further until anticipated production work materialized.

At the conclusion of the discussion in regard to the welders, the representatives of the Respondent Union, as well as Clark, Ghiorso, and Huffman, left the meeting.[8]

Foreman Shields then brought up a problem then confronting him, namely, the further reduction in the number of machinists under his supervision. A seniority list showing the length of service of employees in the mechanical division by departments was studied. Shields stated that two em-

[7]Shop Steward Sohm may also have attended the conference.

[8]Unlike the other witnesses for the Respondents, Harrison's testimony indicated that Gorham did not leave the conference at this time.

ployees under his supervision, John Marovich and James Ashton, produced less from the viewpoint of quantity than did other employees still in his department and that in order to maintain efficient operation and production schedules in his department, he would include Ashton and Marovich in the next layoff of employees of the department and would retain employees with less seniority than Ashton and Marovich possessed. Inasmuch as the Respondent Company had been attempting to adhere to seniority in scheduling layoffs as much as possible, Industrial Relations Manager Goodenough cautioned, "I think you fellows should also bear in mind that when you go outside the seniority provisions, you must be certain that the employee is not capably performing his work, because in most of these cases, you can be assured that you will receive a grievance. You must be able to justify your decision." During the discussion, Tool Supervisor Harrison was asked whether he might have use for the services of Marovich and Ashton in maintenance work, which was under Harrison's supervision. Harrison replied that he believed neither of them to be capable of performing maintenance work.

Goodenough and Gorham specifically denied the utterance of statements or demands attributed to them by Andersen. Their denials were corroborated in varying degrees by the testimony of Shields, Huffman, Clark, Harrison, Buckingham, and Schwartz. These eight witnesses for the Respondents also denied that the names of Scheuermann and Pachorik were mentioned during the conference.

Shields, Huffman, King, Harrison, Clark, and Gorham testified that King's name was not mentioned in the conference, but Schwartz and Buckingham recalled that a brief reference was made to King in connection with transfers to the maintenance department. Buckingham specifically denied that he stated in the conference, as testified to by Andersen, "Well, if one goes in my department they are all going. There won't be any seniority to quibble about."

c. The release of Marovich

In 1941, Marovich entered the employ of the Joshua Hendy Iron Works, the Respondent Company's predecessor, and continued to work at the Sunnyvale plant when the Respondent Company assumed its operation. He had been a member of the International Association of Machinists, Lodge 68, the predecessor of the Respondent Union, and had served as chief shop steward of Lodge 68 until the Respondent Union assumed jurisdiction in 1945 over the employees at the Sunnyvale plant and thereafter Marovich was a member of the Respondent Union. At the time of the hearing he still retained membership in good standing in the Respondent Union.

In 1945, after the Respondent Union assumed jurisdiction of the Sunnyvale plant, the Respondent Union asked him to act as its chief shop steward, but he refused to do so and suggested that Schwartz assume that post. About the same time, Marovich discussed the transfer of Lodge 68 to the Re-

spondent Union with its business agent, Earl Scott, and Scott said, according to Marovich, "I wish you would cooperate more with us. You haven't cooperated a darned bit since you boys have come into the local." Marovich replied, "Scotty, I don't see how I could cooperate. I don't like the way the Grand Lodge dumped us without a voice or vote into your local."

In May or June, 1947, a rival labor organization attempted to organize the Sunnyvale plant and Marovich distributed its membership cards. At a meeting of the Respondent Union in 1948, Marovich expressed an opinion that the officers of the Respondent Union at that time had not been elected in full compliance with its bylaws. Marovich testified that during the 1949 organizational campaign of the IWWU, he read its handbills and in conversations with Chief Shop Steward Schwartz, Marovich frequently "kidded him along and told him that was a lot better than what we had in our department or something to that effect." To these sallies, Schwartz countered, "Oh, you are independent?" Marovich replied, "Well, not yet." However, he testified further that "I didn't go ahead and make an issue of it at all or arbitrate with him too much on that point." He admitted that nearly all employees in the plant discussed the organizational campaign of the IWWU. Respondent Union never expelled Marovich from membership or took official action against him for the above incidents and statements.

In September, 1949, Marovich worked as a ma-

chinist in the mechanical division under the supervision of Foreman Shields. On September 19, 1949, Shields told Marovich, according to the latter's credible testimony, "I have to let you go * * * Tomorrow will be your last day." Marovich then inquired, "On what ground am I being terminated? * * * Am I being terminated under the contract we have here for going down by seniority rights and if it is my turn, * * * I have no objection." Shields replied, "No, Johnnie, it isn't that. It is just the idea * * * You are just not cutting the buck * * * You are taking a little too much time on these smaller machines and your time on the big machines has been fairly good but on the smaller machines you haven't been making the time." Marovich said, "Well, that means that I haven't got the skill, Tommie." Shields replied, "No * * * you are just a little too slow."

On September 20, 1949, Marovich was "released" from the Respondent Company's employ and before leaving the plant, he had an interview with Employment Supervisor William Kelly.[9] During

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[9]In respect to Marovich's "release" from the Respondent Company's employ, Kelly gave the following explanation at the hearing for the three methods followed by the Respondent Company in terminating employment of employees, namely, layoff, release, and discharge:

Marovich was not discharged. Marovich was released for failure to meet production requirements. * * * We have certain posted shop regulations for which a man may be discharged. A person who cannot or does not or will not meet production requirements is released. A person who has done a

the conversation, Kelly told Marovich that the reason for the termination of his employment "wasn't because he couldn't do the work" but "because he wouldn't stay on his machine. He wasn't producing the work."[10]

Having learned of the release of Marovich, Chief Shop Steward Schwartz discussed the matter with Marovich on September 20, 1949, and suggested that a grievance be filed by the Respondent Union in Marovich's behalf. Marovich concurred with Schwartz's suggestion and Schwartz promptly filed a grievance with Foreman Shields on September 20, 1949. Schwartz discussed the matter with Shields for about 30 minutes on September 20, 1949, but was unable to convince Shields that Marovich's termination of employment should be rescinded. Later

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satisfactory job but the work runs out and it is necessary to dispense with his services is laid off. The first, a discharge for violation of Company regulations, would make it very difficult for that man to get employment again. A release would restrict his employment. * * * I would not re-employ a person who has been released back on the same job. It doesn't mean he couldn't work elsewhere if he had the qualifications. A person who was laid off would automatically go on an automatic seniority list for that job or anything similar to that. (Emphasis supplied.)

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[10]The findings in this sentence are based upon the credible testimony of Kelly. Upon the entire record and from his observation of the witnesses, Marovich's version of the conversation is not credited to the extent that it was at variance with that of Kelly. On September 19 or 20, 1949, Ashton was also released from the Respondent Company's employ.

the same day, the second step of the grievance procedure was carried out by appealing the matter to the attention of Superintendent McAuliffe, who was unswayed by the arguments for revocation of Marovich's release.[11] On September 22, 1949, Business Agent Gorham processed the third and final step of the grievance procedure by discussing Marovich's grievance with Industrial Relations Manager Goodenough. The result of the discussion was that the Respondent Company refused to countermand Marovich's termination of employment. Before signing the grievance form, Gorham told Marovich of the discussion and Marovich told Gorham to drop the matter.[12]

Foreman Shields and Welsey Johns, leaderman for Marovich, testified that they had compared the amount of production achieved by Marovich with that done by his successor on the same machine on the second shift from May or June to September, 1949, and found that Marovich's production rate

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[11]The finding in this sentence is based upon the credible testimony of McAuliffe and documentary evidence. Schwartz could not recall whether he processed the grievance through the second step of the grievance procedure. Upon the entire record, the undersigned credits McAuliffe's testimony in this regard.

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[12]The findings as to the processing of the grievance through the third step of the grievance procedure are based principally upon the credible testimony of Gorham. The Respondent Union unsuccessfully processed a grievance in regard to Ashton's termination of employment contemporaneously with the grievance of Marovich.

was low and did not meet the minimum requirements set by the Respondent Company's methods study department. Their complaint related only to the quantity of his production but not the quality of his work. They admitted that they never formally reprimanded Marovich for his low output or warned him that his employment might be terminated, although Johns testified that he told Marovich several times, "Come on, let's get off the dime." Kelly testified that he had had complaints that Marovich was frequently away from his machine during working hours and that Kelly personally had "gone out in the shop repeatedly * * * and told him if he doesn't stay on the machine he wasn't going to be there," both before and after the Respondent Company commenced the operation of the Sunnyvale plant. Aside from Pachorik's testimony that "offhand I would say that [Marovich] was doing a good job," their testimony in this regard was uncontraverted. The testimony of Shields, Johns, and Kelly is credited.

At the time of the hearing, Marovich was still a member in good standing of the Respondent Union. In April, 1950, Assistant Business Agent Gorham telephoned Marovich to inquire whether the latter wished employment. Marovich indicated that he did and Gorham referred him to a position with the San Jose Foundry. Marovich said that he would accept the job but upon reconsideration changed his mind and telephoned Gorham that he would decline the job. Records of the Respondent Union reveal that on June 7, and 8, 1950, the Respondent Union

attempted unsuccessfully to reach Marovich by telephone to refer him to job openings. In July, 1950, when Marovich came to the offices of the Respondent Union to pay his dues, Gorham inquired whether he desired employment and Marovich told him that he would be ready to take a position as machinist about September.

d. Testimony in respect to Pachorik

Pachorik entered the employ of the Respondent Company's predecessor in 1946 and continued in the Sunnyvale plant as a machinist after the Respondent Company assumed its operation.[13]

The only evidence in the record in respect to any possible animus which the Respondent Union might bear Pachorik, is the following undenied testimony of Pachorik: Prior to the representation election and during the campaign period, Pachorik told Chief Shop Steward Schwartz that Pachorik intended to vote for the IWWU in the election. The day after the election, Schwartz met Pachorik and said, "One of the 68." Pachorik replied, "Well, you fellows won the election. Why harp on it?" Schwartz countered, "Well, anyone that would vote for 68 is a Red." According to Pachorik, 68 votes were cast for the IWWU in the election and Schwartz was referring to that fact in the conversation. Schwartz was not questioned in regard to this conversation, but he denied that in discussions with Gorham in regard to the leaders of the IWWU,

[13]Prior to 1946, Pachorik had worked at a Philadelphia plant of the Respondent Company.

the names of Pachorik, or Marovich were mentioned.

In the fall of 1949, sometime after the release of Marovich from the Respondent Company's employ, Foreman Shields informed Pachorik that his name appeared upon a list of employees to be laid off and suggested that Pachorik talk with Buckingham about obtaining a job in the latter's division. Pachorik consulted with Buckingham later in the day and Buckingham promised that he would find a position for Pachorik if necessary.[14]

A few days later, Pachorik went to William H. Kelly, employment supervisor, to inquire about the matter and told him that Pachorik had been in-

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[14]The findings in this paragraph are based principally upon the testimony of Pachorik. In large measure, the testimony of Foreman Shields was corroborative of that of Pachorik, except that Shields did not recall informing Pachorik that his name was on a tentative layoff list. Shields testified that Pachorik was an especially skilled employee whom the Respondent Company desired to retain in its employ and when work which Pachorik had been performing became slack in late 1949, Shields asked Buckingham if the latter might have a position in his division for Pachorik, so that the Respondent Company could retain Pachorik in its employ. Buckingham asked Shields to send Pachorik to talk with him and Shields relayed Buckingham's request to Pachorik. According to Buckingham, on several occasions, Pachorik sought to obtain a transfer to Buckingham's section but Buckingham did not promise to assent to a transfer. Upon the entire record, the undersigned credits the testimony of Pachorik and does not credit Shields or Buckingham to the extent that their testimony was at variance with that of Pachorik.

formed that his name was on a layoff list. Kelly informed Pachorik that when the list of prospective layoffs had been discussed by the Respondent Company's supervisors, it was decided that Pachorik should be retained in the Respondent Company's employ because of Pachorik's special abilities as a machinist but that Kelly would inquire further about the matter. Kelly then went to Industrial Relations Manager Goodenough and told him of his conversation with Pachorik. Goodenough confirmed Kelly's recollection of the decision of the Respondent Company to retain Pachorik in its employ and told him to inform Pachorik that he would not be laid off. McGilvray, who was with Goodenough at the time, affirmed the decision. Kelly reported the conversation to Pachorik.[15]

The record discloses that Pachorik was never laid off during the period of drastic reduction in force, that he was retained in the Respondent Company's

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[15]The findings in this paragraph are based upon the testimony of Kelly, who impressed the undersigned as an especially reliable witness. Pachorik's version of his colloquy with Kelly varied in certain details from that of Kelly. The principal variance was that Pachorik testified that Kelly informed Pachorik after consulting with McGilvray that the latter said, "That boy will stay if he is the last man in the shop, and if necessary, if you have to change the whole damned contract." Kelly specifically denied making this statement attributed to him by Pachorik. Upon the entire record and his impression of the witnesses, the undersigned credits Kelly's version of his conversation with Pachorik and does not credit Pachorik to the extent that his testimony was at variance with that of Kelly.

employ despite that fact that he possessed less seniority than other employees in his department who were laid off, and that the reason for his retention was that he was an especially skilled machinist.

e. Testimony in respect to King

King worked for the Respondent Company's predecessor at the Sunnyvale plant from late 1941 until June, 1944, reentered its employ on April 25, 1946, and continued to work for the Respondent Company after it took over the Sunnyvale plant.

The record contains little evidence indicating animus on the part of the Respondent Union in regard to King. King was a member of the executive board of the Respondent Union for the year 1948 and testified that on five or six occasions in executive board meetings he voiced opposition to positions taken by Assistant Business Agent Gorham. King admitted, however, that he was sometimes in agreement with Gorham's policies. In May, 1948, a question in regard to the interpretation of the vacation provisions of the then current contract was brought in issue by King, who, believing himself entitled to a longer vacation than that approved by the Respondent Company, asked Chief Shop Steward Schwartz to file a grievance in King's behalf. Schwartz refused to do so. Later, King discussed the matter with Gorham, who could not agree to King's interpretation of the vacation provisions. At Gorham's request, Goodenough discussed the matter with King a few days later and affirmed the interpretation of Gorham to the contract. King

testified that he, Marovich, and others criticized the administration of the Respondent Union at meetings; the only specific instance that he recalled apparently was that described by Marovich and set forth above. King admitted that members frequently voiced criticism of the administration of the Respondent Union, its policies and procedures, both at meetings and at work.

Early in September, 1949, King was transferred from the mechanical section to the maintenance department. Within a week thereafter, Gorham told Goodenough, according to the latter's credible testimony, that "he didn't favor that move because Mr. King had been retained outside of seniority * * * and that this move put him into a department where his seniority might protect him; and that he felt that was unfair to the other employees with greater seniority." Goodenough suggested that before Gorham officially protested the transfer of King, Gorham should discuss the matter with the superintendent of the mechanical section. No grievance was ever filed by the Respondent Union in regard to King's transfer. Gorham testified that the only discussion in regard to King was "in connection with general layoffs, on the question of relative seniority, and things of that kind."

f. Conclusions as to credibility

Considering the record in its entirety, the undersigned is impelled to conclude that the testimony

of Andersen is not entitled to credence for the following reasons:

1. The circumstances whereby Andersen allegedly overheard the conversation between the Respondent Company's supervisors and the Respondent Union's representatives are, in the undersigned's opinion, implausible. That is, it seems highly unlikely that a conference held for the purpose of the Respondent Union's voicing its demands for the termination of the employment of four employees, who allegedly were critical of or opposed to it, at a time when no collective bargaining contract between the Respondents was in existence, would have been conducted in an office with a door open into the adjoining office of McAuliffe's secretary. Inasmuch as Andersen was not McAuliffe's regular secretary but was merely substituting in her stead in her absence, it is even more unlikely that a conference of such a nature would be held in a manner to enable a temporary secretary to overhear the remarks. On the other hand, the testimony of the witnesses for the Respondents with respect to the only meeting they all attended in McAuliffe's office in his absence during the latter half of 1949 is manifestly plausible. During the period the Respondents were negotiating for a new contract, certain provisions of the expired contract were still given effect, particularly seniority provisions,[16] and

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[16]The expired contract contained the following provisions in respect to seniority and reductions in force:

In laying off employees consideration will be

during the latter half of 1949, when the Respondent Company was retrenching its operations and personnel, the Respondents met frequently to discuss pending layoffs before they were actually effectuated. The purpose of the conference according to the Respondents' witnesses, arose from the prospect of a necessity for further reduction in the number of welders. The presence of the supervisors from various departments of the Respondent Company's plant in attendance at the meeting was necessary to discuss the problem and the various alternative solutions thereto. Upon the conclusion of the discussion in regard to the welders, the Respondent Union's representatives and certain supervisors left the meeting. Among those who remained, the discussion turned to a problem raised by Foreman Shields in respect to an additional reduction in force in his department. The version given by the Respondents' witnesses of the conference in question is manifestly plausible and logical.

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given to length of service as well as to qualifications for available work. In calling back employees on leave who were laid off for lack of work, the Employer shall give consideration to their qualifications for open jobs and their length of employment with the Employer. The Employer shall agree to cooperate in every way possible to retain the regular working force. When business conditions necessitate retrenchment in operations every effort will be made to distribute work in lieu of a reduction of the working force. When a layoff is necessary because of lack of work, twenty-four (24) hours' notice shall be given the employee of such layoff whenever practicable.

2. Andersen set the date of the conference as occurring on September 9, 1949, a State holiday. The testimony of Buckingham and Gorham with respect to their activities that day is most persuasive and indicates that the conference could not have been held on that day. Gorham testified that it occurred on September 6, the day after Labor Day. Schwartz recalled that the meeting was held on the day he returned from his vacation, September 6. The testimony of Buckingham, Gorham, and Schwartz in this regard is convincing and is credited.

3. In her testimony, Andersen attributed to Gorham a statement "now that the contract is pretty well buttoned up," indicating that agreement had been reached by the Respondents on most of the important provisions of the contract prior to the conference in question. Later she testified that in the same meeting Goodenough said that Gorham "has been a pretty good boy when it came to signing this contract." Insofar as the statement attributed to Goodenough signified that the contract between the Respondents had been signed, Andersen's testimony has no basis in fact, for the Respondents at this time were in the process of negotiating the contract and did not execute it until October 10, 1949. Furthermore, the credible testimony of Goodenough and Gorham establishes that on September 6, 1949, the contract was by no means "buttoned up" for the parties had not yet reached

agreement on several important provisions.[17] Thus, the weight of the credible evidence refutes the testimony of Andersen in regard to the status of the contract then in the process of negotiation.

4. According to Andersen, Assistant Business Agent Gorham requested the Respondent Company "to get rid of" Marovich. Yet, the uncontroverted credible testimony establishes that immediately after Marovich's employment was terminated by the Respondent Company, Shop Steward Schwartz suggested that a grievance be filed by the Respondent Union in Marovich's behalf and the grievance was filed and processed by the Respondent Union. Furthermore, the Respondent Union thereafter referred Marovich to employment and attempted to reach him on another occasion to refer him to employment. Still later, Gorham inquired when Marovich would be available for employment. If Andersen's testimony is credited and it is found that the Respondent Union demanded that Marovich be re-

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[17]The undersigned has considered the arguments of the General Counsel in regard to this issue but cannot agree that notes of the Respondent Company covering a bargaining conference held on September 19, 1949, corroborates Andersen's testimony that agreement had been reached on several important items. In the undersigned's opinion, the documents in question support the testimony of Goodenough and Gorham that agreement had not been reached. In addition, it is noteworthy that the terms and provisions of the new contract were substantially different from those of the expired agreement and negotiations for the new contract continued regularly for approximately 2 months.

leased from the Respondent Company's employ and then immediately thereafter processed a grievance protesting such release and still later on several occasions sought to obtain employment for him, the Respondent Union was following an incredibly duplicitous course of action in respect to Marovich. The undersigned cannot reconcile Andersen's testimony in regard to Marovich with the Respondent Union's subsequent efforts in Marovich's behalf and cannot believe that the latter efforts were a Machiavellian subterfuge to conceal its illegal request for the termination of Marovich's employment. The undersigned concludes that the Respondent Union's efforts in the cause of Marovich subsequent to his release effectively belie the testimony of Andersen in respect to the Respondent Union's demand for the termination of his employment.[18]

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[18]The General Counsel contends that certain aspects of the testimony in regard to the release of Marovich lends credence to Andersen's testimony. Admittedly, Marovich's immediate supervisors gave him no timely warning that his employment might be terminated due to the lack of quantity of his production and there is some conflict among the testimony of the Respondent Company's witnesses as to whether he was laid off because of lack of work or released because of inability to meet production standards. Although these matters may give rise to some doubt as to the reasonableness of the action taken by the Respondent Company, the undersigned cannot agree with the General Counsel's contentions that they buttress Andersen's testimony. The conflict in the testimony as to Marovich's discharge is more apparent than real; actually, the testimony of the Respondent Com-

5. In addition, the record contains little probative evidence to sustain the complaint's allegation that the motivation for the Respondent Union's alleged illegal requests for the discharge of King, Pachorik, or Marovich arose from their expression of preference for the IWWU or criticism of the Respondent Union. The lack of evidence of such motivation gives reason to suspect the credibility of Andersen's testimony that the Respondent Union requested their discharge. None of these three was active in the IWWU. Although King and Marovich

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pany's witnesses is mutually reconcilable. As stated by McAuliffe in regard to the reasons for the release of Marovich and Ashton, "They were primarily terminated for their inability to meet production requirements. It was during a period, however, when work was very slow." It will be recalled also that, as stated above, Goodenough warned Shields, when the latter proposed to include Marovich and Ashton in the next reduction in force, "I think you fellows should also bear in mind that when you go outside the seniority provisions, you must be certain that the employee is not capably performing his work, because in most of these cases, you can be assured that you will receive a grievance. You must be able to justify your decision." In view of these factors, as well as the obvious fact that not all witnesses were so precise in their testimony as Employment Supervisor Kelly in following the close distinctions between "layoff," "release," and "discharge," as these terms were administered by the personnel department, the undersigned is of the opinion that these aspects of the testimony of the Respondent Company's witnesses afford no support to Andersen's testimony, which, in any event, is effectively controverted by the efforts of the Respondent Union on Marovich's behalf subsequent to his release.

testified that they had voiced criticisms of the administration of the Respondent Union in meetings and on occasion disagreed with its officers, the record shows that they were not alone in expressing such criticisms, which, at most, appear to be customary conduct resulting from the application of democratic principles in any organization. King's disagreement with Gorham as to the interpretation of the vacation clause in the contract in effect during 1948 is insufficient, in the undersigned's opinion, to support an inference that such disagreement gave the Respondent Union reason to desire, a year later, the termination of King's employment with the Respondent Company. Although Marovich jested with Schwartz in regard to the IWWU, Pachorik told Schwartz that the former intended to vote for the IWWU in the election, and after the election Schwartz accused Pachorik of being a supporter of the IWWU, it is significant that in none of these conversations did Schwartz express any threat of retaliation by the Respondent Union. Furthermore, none of the three was expelled from membership or subjected to any official criticism or sanction by the Respondent Union for their alleged criticism of it or preference for the IWWU. Indeed, as pointed out above, the Respondent Union rushed to the aid of Marovich upon his release from the Respondent Company's employ and processed a grievance in his behalf. In addition, it later referred him to job openings. The undersigned concludes that the complaint's allegations in respect to the Respondent

Union's motivation for its alleged attempt to cause the Respondent Company to discharge King, Pachorik, and Marovich has not been sustained by a preponderance of the credible evidence and that this factor negates the credibility of Andersen's testimony in regard to the demands of the Respondent Union at the conference on September 6, 1949.

6. Another consideration is the fact, previously noted, that in view of her friendship with Scheuermann and Ollis, and the fact that the latter two had shortly before the hearing assisted in the building of a car port for Andersen, it cannot be said that Andersen was a completely disinterested witness. In addition, although Andersen testified that she related to Scheuermann and Ollis the occurrences at the conference in question the same evening it occurred and thereafter discussed it with them, it is indeed curious that Andersen's knowledge of the conference was not brought to the attention of the General Counsel until the day on which she was called as a witness, despite the fact that an investigation by a field examiner of the Board had been conducted in respect to the original charge relating to the termination of Scheuermann's employment.[19] This circumstance, considered in conjunction with the fact that in her usual work as a copy typist she assisted McAuliffe's regular secretary in the typing of termination papers, layoff

[19]This observation is by no means intended to cast aspersion on the General Counsel or to infer that he was a party to any fabrication of testimony or collusive action.

lists, and seniority lists during the period the Respondent Company was curtailing production and personnel, might serve as the basis for an inference that with the use of the knowledge gained in her work, her account of the conference in question was a fictitious elaboration on an actual conference held on September 6, 1949. However, for the purpose of this Report, it is unnecessary to determine whether her account was actually fictitious or merely inaccurate. For the foregoing reasons and upon the entire record, the undersigned concludes that Andersen's testimony is not entitled to credence.[20] The testimony of the Respondents' witnesses, as previously summarized, is credited.[21]

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[20]In reaching this conclusion as to Andersen's credibility, the undersigned has considered the facts in relation to Scheuermann's discharge, as hereinafter set forth. Conversely, in weighing Scheuermann's testimony, the undersigned has considered the friendship among Scheuermann, Ollis, and Andersen, as well as the circumstances set forth in this paragraph of the text.

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[21]In reaching these conclusions as to the credibility of the witnesses, the undersigned has carefully considered the testimony of all witnesses and noted that there is some conflict in the testimony of the Respondents' witnesses as to the conference in question and as to other events. In the interest of brevity, a detailed summary of the testimony of each of the Respondents' witnesses has not been set forth. The undersigned is unable to agree with the General Counsel's contentions that the conflicts in the testimony of the Respondents' witnesses negate their credibility or buttress the testimony of Andersen. Their testimony on the chief issues

g. Conclusions as to the complaint's allegations of unfair labor practices on the part of the Respondent Union in September, 1949.

Having found that Andersen's testimony is not entitled to credence, the undersigned concludes and finds that in September, 1949, the Respondent Union did not attempt to cause the Respondent Company to discharge King, Pachorik, or Scheuermann and did not cause the Respondent Company to discharge Marovich because they had expressed a preference for the IWWU or criticized the Respondent Union and that accordingly the Respondent Union did not engage, in September, 1949, in violations of Section 8 (b) (1) (A) or 8 (b) (2) of the Act, as alleged in the complaint.

h. Conclusions as to the complaint's allegations of unfair labor practices on the part of the Respondent Company in regard to Marovich.

Having found that the Respondent Union did not request the Respondent Company to terminate the employment of Marovich and did not engage in any unfair labor practice with respect to Marovich, the

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raised by the conference is mutually reconcilable and in the undersigned's opinion the conflicts in their testimony are relatively minor and are of the type that is to be expected when some eight witnesses relate their independent recollection of the occurrences at a conference and other events occurring more than a year prior to the time they gave their testimony. Indeed, in the opinion of the undersigned, such variance among their testimony lends substantially more credence to their version of the conference and other events than would their complete agreement on every detail.

undersigned concludes that the evidence does not sustain the complaint's allegations that "on or about September 20, 1949, [the Respondent Company] discharged John Marovich pursuant to the request of the Union" in violation of Section 8 (a) (1) and (3) of the Act.

B. The discharge of Scheuermann

1. Scheuermann's employment history; his expulsion from membership in the Respondent Union.

Scheuermann entered the employ of the Respondent Company's predecessor in June, 1941, and continued to work at the Sunnyvale plant after the Respondent Company assumed its operation. In 1941, he joined the Respondent Union's predecessor and was a member of the Respondent Union after it assumed jurisdiction in the Sunnyvale plant.

As mentioned above, shortly before the expiration of the Respondents' closed-shop contract on April 1, 1949, Scheuermann was one of the organizers of the IWWU and became its president, and was active in its organizational campaign.

On March 4, 1949, the Respondent Union notified Scheuermann that it had been charged that Scheuermann had violated the following provision of its constitution:

> Any member or members of any local lodge who attempt to inaugurate or encourage secession from the Grand Lodge or any local lodge, or who advocate, encourage, or attempt to inaugurate any dual labor movement, or who violate the provisions of the Constitution of the

> Grand Lodge, or the constitution for local lodges, shall, upon conviction thereof, be deemed guilty of conduct unbecoming a member and subject to fine or expulsion, or both.

On the same date, the Respondent Union notified Scheuermann that its trial committee would consider the charges against Scheuermann on March 8, 1949, and requested that he be present. At a meeting of the membership of the Respondent Union, apparently held about March 16, 1949, a report of the trial committee was submitted and the membership by secret ballot voted to expel Scheuermann from membership and fine him $500. By letter dated March 22, 1949, the Respondent Union notified Scheuermann of the action taken by it in this regard.

On March 25, 1949, Scheuermann's attorney sent the Respondent Company the following letter, addressed to Goodenough's attention:

> This is to advise you that on or about March 23, 1949, three of your employees, Clyde Scheuermann, Thomas H. Mullen and Les Ollis were notified by Local No. 504 International Association of Machinists that they have been found guilty of "dual unionism" on account of their activities in the formation of the International Westinghouse Workers Union, a labor organization.
>
> We have reason to anticipate that demand may be presented to you for discharge or other

disciplinary action against these employees, either under the closed shop contract of the union or on some other pretext.

You are, of course, well aware of the National Labor Relations Board's rule, since confirmed by the courts, that activity in behalf of a rival union is privileged when it occurs at a time which is appropriate for the determination by the Board of the question of representation. This doctrine is popularly referred to as the Rutland Court doctrine. Under the circumstances, we are confident that you are fully aware that the discharge of the aforementioned employees, either now or at some future time, because of their union activities would constitute an unfair labor practice.

This letter, which is supplementary to previous notifications along the same line, is merely for the purpose of dispelling any possible question which may have occurred to you concerning the rights and status of the employees concerned.

On April 1, 1949, the Respondents' collective bargaining, agreement, containing closed-shop provisions, terminated.

On May 12, 1949, the Respondent Union sent Scheuermann the following letter:

Please be advised that we have been informed by General Secretary Treasurer Eric Peterson that the $500.00 fine imposed against you by Lodge 504 has been approved by the Executive

Council and that the Grand Lodge records have been indicated to show that you have been fined the sum of $500.00 and expelled from membership.

2. Attempts by Ollis to pay dues in spring and summer, 1949; Scheuermann's payment and remission of dues.

Ollis testified that in March, 1949, after his expulsion from membership in the Respondent Union but before the termination of the Respondent's contract on April 1, 1949, he offered to pay to Steward Elmer Smiley 2 months' dues in the Respondent Union thru March 31, 1949, the expiration date of the contract. According to Ollis, the following colloquy ensued:

> * * * he told me I would be a damned fool to pay them because I had been expelled. I told him, regardless, that they had the contract, then, I wanted to pay dues as long as they had the contract, so he gave me a receipt for the money and said I was still being foolish, but he took them. That was the last time he took dues from me.

Ollis further testified that on three or four other occasions in the spring and summer of 1949, he offered to pay dues in the Respondent Union to Smiley but Smiley refused to accept them. According to Ollis, on one of these occasions he offered to pay initiation fees.

Smiley, on the other hand, insisted that on only

one occasion did Ollis offer to pay dues. This incident occurred about a month after Ollis was expelled from membership in the Respondent Union and fined. When Ollis offered the dues, Smiley, according to his testimony, told Ollis, "There is no use me taking any of your dues. They will send it back." Smiley testified, in addition, that the reason he refused Ollis' offer of dues was Smiley's belief that "the bylaws of our Union says that no member don't have to pay dues—if you are not a member you don't have to pay dues, so why should I collect dues if they are not a member?" Smiley denied that Ollis at any other time offered to pay or talked about paying dues.

Ollis did not impress the undersigned as a reliable witness. As the record shows, he was belligerent and evasive (particularly as to the tender of dues in the spring and summer following the March incident), and, in the opinion of the undersigned, purposely slanted his testimony in an effort to bolster Scheuermann's case. As between Ollis and Smiley, the latter impressed the undersigned as the more credible witness. In view of these considerations, as well as the fact found below that Smiley refused an offer of dues by Scheuermann in March, 1949, the undersigned does not credit Ollis' testimony as to his payment of dues in March, 1949, or his offer of dues and initiation fees on three or four occasions later in the spring and summer of 1949.

Scheuermann testified that in late March he offered to pay to Steward Smiley 1 month's dues but that Smiley refused to accept them, saying, "I

can't take dues from you. I have been told not to." Smiley was not questioned specifically with regard to this incident. However, Gorham testified that he never instructed any shop steward not to accept dues from Scheuermann. In view of the fact that records of the Respondent Union show that Scheuermann customarily paid his dues to Smiley, as well as Smiley's credited testimony set forth above in relation to the incident with Ollis, the undersigned finds that in March, 1949, Scheuermann offered to pay dues to Smiley but Smiley refused to accept them.

A little later, Scheuermann offered to pay the dues to Steward Louis Nunez, who accepted them and remitted them to the Union. It appears from a letter, set forth below, that thereafter Scheuermann submitted to the Respondent Union's office two additional payments for monthly dues. Records of the Respondent Union show that in March, 1949, Scheuermann paid his dues to Nunez for the month of January and in May he paid his dues, through the Respondent Union's office, for the month of February.

On June 3, 1949, the Respondent Union wrote Scheuermann the following letter and returned his last three payments of dues:

> Enclosed you will find your money order for $2.00 which was recently sent to Local 504. Also a money order for $4.00, $2.00 of which was sent in the last of March and $2.00 the first of May.

As you know, in accordance with the Constitution, the members of Lodge 504 voted to expel you on March 16, 1949. The General Secretary Treasurer of the International Association of Machinists advised Lodge 504 in a letter dated April 28, 1949, that the Executive Council of the International Association of Machinists had concurred with the action of Lodge 504 in expelling you and fining you the sum of $500.00 for violation of the Constitution of the International Association of Machinists. You are, therefore, not a member of the International Association of Machinists and we cannot accept dues from you.

3. The elections; execution of the Respondents' contract

Pursuant to the Board's Decision and Direction of Elections, elections in three voting groups were conducted among the Respondent Company's employees on July 7, 1949, the IWWU being on the ballot in each of the voting groups. The Respondent Union won the election in its voting group and was certified by the Board on July 19, 1949. Within a short time after the election, the IWWU disbanded. In August, 1949, the Respondents commenced negotiations for a new collective bargaining contract. On August 25, 1949, a union-shop authorization election was conducted under the direction of the Regional Director among the employees in the bargaining unit for which the Respondent Union was the statutory representative. A certification of the results of

the election showing that a majority of the eligible voters had voted to authorize a union-security agreement was issued on September 7, 1949. Negotiations for a contract continued between the Respondents, culminating in agreement among the negotiators as to the terms thereof in late September, 1949, subject to ratification by the membership of the Respondent Union. On October 9, 1949, a Sunday, a special membership meeting, widely publicized by notices to members and notices posted on bulletin boards in the plant, was held to consider the terms of the proposed contract. The membership voted to ratify the contract and on October 10, 1949, the Respondents formally executed it.

The agreement contained the following provision in respect to union security:

> All employees in the bargaining unit described in Section I shall, on and after the thirtieth day following the beginning of their employment, or October 10, 1949, whichever is the later, become and remain members of the Union, as a condition of their employment, during the life of this Agreement, and the Union shall notify the Company promptly in writing of the failure of any such employee to become or remain a member of the Union; provided, however, that the Union shall not request the Company to discriminate against any employee for non-membership in the Union if such membership is not available to the employee on the same terms and conditions generally applicable to other members, or if membership is denied

or terminated for reasons other than the failure of the employee to tender the periodic dues or initiation fees uniformly rquired by the Union as a condition of acquiring or maintaining membership.

Although copies of the contract were not posted, copies were given immediately to all supervisors of the Respondent Company and to all stewards of the Respondent Union.

Scheuermann, as well as Ollis, denied that they were aware of the union-shop provisions of the contract. Upon the entire record, the undersigned is unable to credit their testimony in this regard. Admittedly, Scheuermann was aware of the contract negotiations between the Respondents, of the conduct of the union-shop authorization election, and of the certification of the Respondent Union as a result thereof. Indeed, he testified that although he did not participate in the union-shop authorization election, he would have voted for a union shop, realizing that if provisions therefor were included in a contract, he would be required to be a member of the Respondent Union. He also testified that throughout the 8 years he was employed at the Sunnyvale plant, the Respondent Union or its predecessor held closed-shop contracts until the expiration of the last contract on April 1, 1949.

About a week after the union-shop authorization election, Leaderman Emil Tonascia asked Scheuermann, "Now that the * * * shop has won the union election, what effect will that have upon you?"

Scheuermann replied, according to Tonascia's credible testimony, "None whatever. The Taft-Hartley law protects me."[22]

The record also discloses that the special meeting of the Respondent Union held on October 9, 1949, to ratify the proposed contract was widely publicized by posted notices at the plant and was discussed at work by employees. Scheuermann admitted that he knew that the special meeting of the Respondent Union was being held on October 9 and that he was aware of the purpose of the meeting. In addition, after the execution of the contract and about 2 weeks prior to Scheuermann's discharge, Shop Steward Nunez and Scheuermann discussed various terms of the contract, including its seniority, job classification, dues checkoff, and union-security provisions.[23] In view of these considerations, as well as the fact that inherent in Scheuermann's

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[22]Scheuermann did not specifically deny the testimony of Tonascia, although Scheuermann denied generally that he had any conversations with Tonascia or other employees in regard to the union-security provisions of the contract. Upon the entire record and his observation of the witnesses, the undersigned credits Tonascia's testimony and finds Scheuermann's general denial unentitled to credence.

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[23]This finding is based upon the credible testimony of Nunez. Scheuermann did not specifically deny the testimony of Nunez. Scheuermann denied generally that he talked with any employees in regard to the union-security provisions of the contract. For the reasons heretofore stated, Scheuermann's general denial is not credited.

and Ollis' testimony in respect to an attempt by Ollis to pay dues to Steward Smiley in October, 1949, discussed below, is the knowledge on their part of the union-security provisions of the contract, the undersigned does not credit their denials that they had no knowledge of the union-security provisions but finds upon the entire record that they were aware of such provisions.

4. Allis' attempt to pay dues in October, 1949

Ollis testified that "in the last week or so" before his employment with the Respondent Company was terminated on October 17, 1949, employees in conversations frequently referred to him as a "free rider," and that on one occasion in a discussion with other employees in the locker room between October 10 and 17, 1949, when they called him a "free rider" in the presence of Scheuermann, Steward Smiley, and employees Henry Groth and Malcolm Nelson, the following occurred:

> I offered to pay dues to Smiley at that time and I offered, I believe I phrased it that we were willing to pay dues at any time, or possibly I said I am willing to pay dues, but I recall very definitely Smiley saying, as he had said before, "You know, we don't want any dues from you guys." * * *

Scheuermann's version of the incident in the locker room was as follows:

> There was an incident of kidding about "free riders." It perturbed Ollis and he said, "How about it, Smiley? How about taking some dues

now?'' Smiley said, You know I can't take dues from you guys. There was some more bantering and that was the end of it.

Nelson corroborated the testimony of Ollis and Scheuermann in that he recalled the incident having occurred when Ollis offered to pay dues but Smiley refused to accept them; however, he could not recall the conversation of the participants.

Smiley specifically denied that Ollis ever offered to pay dues in the locker room, and Groth testified that he could remember no such incident, although the latter recalled that Scheuermann and Ollis were jestingly referred to as ''free riders.''

Nelson and Groth were more nearly disinterested witnesses than the others testifying to this incident. From his observation of the witnesses, the undersigned finds, upon the testimony of Nelson, Scheuermann, and Ollis that between October 10 and 17, 1949, in a bantering conversation in the locker room and after being called a ''free rider,'' Ollis offered in Scheuermann's presence, to pay dues to Smiley, but Smiley refused to accept them. Smiley's denial is not credited.

In connection with collection of dues, it might be noted that at the time in question stewards, as a convenience to members, took dues when offered and remitted them to the Respondent Union's office. It appears that applications for membership and payments of initiation fees were customarily handled by the Respondent Union's office and not by the stewards.

5. The discharge of Scheuermann

On November 11, 1949, Gorham submitted the following letter to Goodenough at the beginning of a conference on a grievance:

> We are requesting Westinghouse Electric Corporation, Sunnyvale plant, to terminate the employment of Louis G. Gennai, Cleveland A. Norris and Clyde W. Scheuermann for failure to comply with Section 2 of the Agreement between Westinghouse Electric Corporation, Sunnyvale plant, and District Lodge No. 93, International Association of Machinists.[24]

Goodenough asked Gorham whether the individuals named in the letter "had been given the same opportunity to join the union as all other individuals under the jurisdiction of the I.A.M.," whether the request for the termination of employment of the three employees was in compliance with the union-security provisions of the Respondents' contract, and whether Gorham believed that the request for the terminations of employment was in compliance with the Act. Gorham replied in the affirmative to each of these questions. Goodenough then requested that Gorham submit a statement in writing that the three employees whose discharge was requested had been given the same opportunity as

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[24]The Respondent Union, later on November 11, 1949, deleted Gennai's name from the letter when it was discovered that he had made arrangements to pay his initiation fees to a steward but had been unable to do so because of the steward's illness.

other employees to join the Respondent Union.[25]

When Scheuermann reported to work on the second shift on the afternoon of November 11, 1949, he was sent to Superintendent McAuliffe. The latter read him the Respondent Union's request for his discharge, set forth above, and then gave it to Scheuermann to read. McAuliffe read the union-security provisions of the contract to Scheuermann and gave him the contract to read. Scheuermann protested, "Yes, but I don't think this applies to me * * * because I feel mine is a special case." In addition, Scheuermann stated that he believed himself unable to comply with the union-security provisions of the contract because "You know of the election and the fact that I was fined and expelled." According to Scheuermann, McAuliffe stated that he had discussed the matter with Goodenough and "was of the opinion that it just wasn't quite right." Nevertheless, Goodenough assured McAuliffe that he had asked Gorham "the three necessary questions and as far as he was concerned, why, they were going to abide by the agreement." McAuliffe then

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[25]The findings in this paragraph are based principally upon the credible testimony of Goodenough. In compliance with Goodenough's request, Gorham submitted the following letter dated November 15, 1949:

In answer to your question regarding my letter to you of November 11, 1949, please be advised that all of those listed in this letter for termination were given the same opportunity to become members of our organization as anyone else working in your plant at Sunnyvale.

said, "I don't think they can make it stick, do you?" Scheuermann concurred, and asked "Well, what do you expect me to do?" McAuliffe replied, "Well, they have asked me to terminate you and we are going to go through with it," and gave Scheuermann his termination papers.[26]

On Monday, November 14, 1949, Scheuermann went to the Board's Regional Office in San Francisco and consulted a field examiner. Later that day, he stopped at the Respondent Union's office in San Jose and asked a clerk for an application for a membership card, which was supplied him. When he had filled it out and submitted it to the clerk, the latter examined some files and then went into Business Agent Earl Scott's office. The clerk returned, discarded Scheuermann's application, and told him that Scott wished to see him.

According to Scheuermann, he had the following conversation with Scott:

> I told him I was out to try to * * * see what we could do about my being laid off at Westinghouse, and he said * * * Yes, "Clyde, I think we can do something. You pay your back dues

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[26]The findings in this paragraph of the text are based upon the testimony of Scheuermann. McAuliffe's version of the conversation varied substantially from that of Scheuermann and McAuliffe specifically denied most of the remarks attributed to him by Scheuermann and also denied that Scheuermann mentioned that he had been fined and expelled from the Respondent Union. The probabilities of the situation favor Scheuermann's version of the colloquy. Although the matter is not free from doubt, Scheuermann's version is credited.

and your new initiation fee and the $500 fine—" he added that, and I kind of smiled at that, and I said, "Oh, yeah?" I didn't even express it beyond that point and he said, "Well, I will tell you, Clyde, I don't know anything about the case. I haven't been following it. Frank [Gorham] has been handling that." And he said, "I will make an appointment with him," and I said, "Well, all right." And I said, "Whatever time you say will be all right." And I said, "Whatever time you say will be all right," so he made it for ten o'clock the next morning.[27]

Later in the afternoon of November 14, 1949, Scheuermann went to the Respondent Company's plant and consulted Goodenough. He informed Goodenough of his visit to the Board's office, of his

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[27]Pursuant to arrangement made during the course of the hearing, Scott's testimony was taken by deposition on September 25, 1950. Therein, Scott denied that he told Scheuermann that the latter's problem might be solved if he paid his back dues, reinstatement fee, and the $500 fine. According to Scott, he told Scheuermann that the latter "would have to see Mr. Gorham. Mr. Gorham had been assigned to take care of Lodge 504 and I never injected myself into those matters on reinstatements or initiations, things like that. I never handle that," and that an appointment could be made with Gorham. Although the matter is not free from doubt, the undersigned believes that on the record, Scheuermann's version of the colloquy is more accurate than Scott's inasmuch as the latter's testimony on cross-examination as to other incidents regarding Scheuermann appears to be somewhat vague, if not evasive. Accordingly, Scheuermann's testimony, set forth in the text, is credited.

conversation with Scott, and of his appointment with Gorham the following day. Scheuermann asked Goodenough whether "there wasn't something that could be readily fixed up between us rather than to have it go this far." Goodenough replied that in his opinion the Respondent Company had complied with the union-security provision of its contract with the Respondent Union and "didn't see that any change could be made." Scheuermann disclaimed any knowledge of the union-security provisions of the contract and explained his expulsion from membership in the Respondent Union to Goodenough. The latter suggested that Scheuermann inform him of the outcome of his appointment with Gorham the following day.[28]

On November 15, 1949, Scheuermann kept his appointment with Gorham and asked to "make application to abide by the union shop." Gorham replied that he could not take Scheuermann's application inasmuch as he was unemployed. In this regard, Gorham testified that in periods when employment is curtailed and no jobs are available, the policy of the Respondent Union forbade him from taking "applications from people who are not employed."[29]

Shortly thereafter on November 15, 1949, Scheuermann reported the outcome of his interview with

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[28]The findings in this paragraph are based upon the mutually reconcilable testimony of Goodenough and Scheuermann.

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[29]The findings in this paragraph are based upon the mutually reconcilable testimony of Scheuermann and Gorham.

Gorham to Goodenough. Scheuermann inquired whether there was any criticism of his work performance and Goodenough replied that there was none. Upon his request, Scheuermann was given a copy of the Respondents' contract.

6. Conclusions as to the termination of Scheuermann's employment

To recapitulate the facts as to Scheuermann, it has been found that he was a member in good standing of the Respondent Union for a number of years. In early 1949, he became one of the organizers of the IWWU and its first president but continued to maintain his membership in the Respondent Union. On March 22, 1949, the Respondent Union notified him that on March 16, 1949, he had been expelled from membership and fined $500 for dual unionism. On March 25, 1949, Scheuermann's attorney advised the Respondent Company by letter of the fact that Scheuermann and two other employees had "been found guilty [by the Respondent Union] of 'dual unionism' on account of their activities in the formation" of the IWWU and warned the Respondent Company that "the discharge of the aforementioned employees, either now or at some future time, because of their union activities would constitute an unfair labor practice."

On April 1, 1949, the Respondents' closed-shop contract expired. On May 12, 1949, the Respondent Union informed Scheuermann that its Executive Council had approved the action taken by the Respondent Union in regard to Scheuermann. In

March and May, after his expulsion from membership, Scheuermann submitted to the Respondent Union his dues for the months of January and February and, apparently in late May or early June, mailed it his dues for the month of March. On June 3, 1949, the Respondent Union returned these three payments of dues, stating, "You are * * * not a member of the International Association of Machinists and we cannot accept dues from you."

From April 1, 1949, until October 10, 1949, there was no collective bargaining contract between the Respondents, and during that period employees were free to become and/or remain members of the Respondent Union or to refrain from becoming and/or remaining members. On October 10, 1949, the Respondents executed a valid contract requiring as a condition of employment that employees then in the Respondent Company's employ should become and remain members of the Respondent Union "on and after the thirtieth day following" the date of the contract's execution. It has been found that Scheuermann had knowledge of the contract and its union-security provisions. On an occasion between October 10 and 17, 1949, he was present when Ollis expressed to Steward Smiley a willingness to pay dues but Smiley refused to accept dues from Ollis.

On November 11, 1949, the 32nd day after the execution of the contract, the Respondent Union requested that the Respondent Company discharge Scheuermann for failure to comply with their contract's union-security provisions. On that date, the

Respondent Company acceded to the Respondent Union's request and discharged Scheuermann.

The issues arising from Scheuermann's discharge, as framed by the pleadings and the contentions of the parties, are based upon those provisions of Section 8 (a) (3) and 8 (b) (2) of the Act banning discrimination against an employee subject to a union-shop contract if his "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly rquired as a condition of acquiring or retaining membership."[30]

The first question posed by the facts of the instant case is whether an employee who was expelled from membership in a labor organization on charges of dual unionism at a time when that organization held a closed-shop contract with the employer may thereafter (8 months later) be discharged for failure to comply with the union-security provisions of a succeeding contract between the employer and the labor organization. A strict construction of the words of

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[30]The complaint does not allege, and apparently the General Counsel does not contend, that Scheuermann's discharge fell within the proscription of proviso A to Section 8 (a) (3) of the Act; namely, that membership in the Respondent Union was not available to him "on the same terms and conditions generally applicable to other members." Accordingly, the undersigned deems it unnecessary for the purposes of this Report to consider Scheuermann's discharge in relation to such proviso, except to note that if this were an issue in the case, the undersigned's conclusions in that regard would be those briefly noted in footnote 40 infra.

the Act would indicate that Scheuermann's expulsion from membership in the Respondent Union on charges of dual unionism in March, 1949, and subsequent discharge in November, 1949, for failure to comply with the union-security provisions of the Respondents' contract, executed in October, 1949, would fall within the interdiction of the Act, inasmuch as it would appear that Scheuermann's "membership was * * * terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of * * * retaining membership." However, an examination of the Congressional history and enunciated Board policy in respect to the sections of the Act under discussion, reveal that to be violative of the Act the termination of the employee's membership in a labor organization referred to therein and his subsequent discharge must both occur within a period of time covered by a current contract. Thus, the report of the Senate Committee on Labor and Public Welfare states the following:

> Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired if a majority of such employees have shown their intent by secret ballot to confer authority to negotiate such an agreement upon their representatives. But in order to safeguard the rights of employees after such a contract has been entered

into, three additional safeguards are provided: (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues * * * It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements. (Emphasis supplied.)[31]

That an employee's expulsion from membership in a labor organization for reasons other than nonpayment of dues and initiation fees and subsequent discharge must both occur during the term of a contract to be violative of the Act appears to have been the conclusion of the Board in the Pen and Pencil Workers case.[32] There an employee, subject to a contract containing union-security provisions and expiring in 1948, was fined by the union in 1947, expelled from membership for failure to pay the fines, and discharged in 1947 upon the request of the union pursuant to the contract. In 1948, after the

[31]Sen. Rep. 105, 80th Cong., p. 7. See also, statements of proponents of the Act in debate, 93 Cong. Rec. A3141, 4317-8, 4401.

[32]Pen and Pencil Workers Union, Local 19593, AFL, 91 NLRB No. 155.

execution of a new and valid union-shop contract, the employee was rehired, tendered her initiation fee and dues to the union, but refused to pay the outstanding fines. The union rejected her tender of initiation fee and dues upon her refusal to pay the fines and requested the employer to discharge her. The employer complied with the union's request. The Board held that the union had violated Section 8 (b) (2) by causing the employer to discriminate against the employee by insisting upon payment of the fines and rejecting her tender of dues and initiation fee, the meaning of which terms the Board held not to embrace the fines.

Inferentially, it appears that the Board did not consider the employee's expulsion from membership in the union under the prior contract to mean a denial or termination of membership in the union at a subsequent time when the employee became subject to the terms of a later union-shop contract. Indeed, to hold to the contrary would contravene the clearly expressed intent of the Congress to protect labor organizations by the provisos to Section 8 (a) (3) against "free riders"[33] and, as succinctly stated in the Respondent Company's brief, would enable employees subject to a union-shop contract to "violate their duties as members [of the contracting union] and force the Union to expel them and thereby enter at will into a privileged class, perpetually immune from union security provisions and

[33]See Union Starch & Refining Company, 87 NLRB 779, for a discussion of this factor.

from any obligation of tendering dues or fees, and they could remain in that privileged category despite successive contracts which would otherwise impose new conditions of employment upon them in that regard." In view of these considerations, the undersigned finds that the fact that Scheuermann was expelled from membership in the Respondent Union for dual unionism in March, 1949, near the end of the closed-shop contract, does not, in itself, make his discharge, subsequently effected under the terms of a later union-shop contract, discriminatory.

The second question to determine is whether it was necessary for Scheuermann to tender an initiation fee and dues in order to comply with the 1949 contract's union-security provisions, of which it has been found Scheuermann had knowledge. The General Counsel contends that "if the employee whose membership has been terminated continues in employment past his expulsion up to the time of a new union security contract, all that can be required under the new contract is resumption of payment of dues as a condition for his reacquiring membership. Otherwise the union could exact fines from dual unionists in the form of a new initiation fee." Although the matter is not free from doubt, the undersigned is of the opinion that the argument of the General Counsel must be rejected and that the clear inference of the Board's decision in the Pen and Pencil Workers case is to the effect that Scheuermann was under the duty to tender both initiation fees and dues in order to comply with the contract. The fact that Scheuermann's tenure of employment with the Respondent Company remained unbroken

following his expulsion from membership in the Respondent Union in March, 1949, until the Respondent Union's request for his discharge in November, 1949, for noncompliance with the union-security clause of the 1949 contract is not, in the undersigned's opinion, sufficient to distinguish the instant proceeding from the Pen and Pencil Workers case, in which there was a break in the period of the employee's employment between the date of expulsion from membership under one contract and the execution of the second. In each instance, the employees were in the same position following their expulsion from the contracting union; each was a new employee for the purpose of compliance with the union-security provisions of the new contract and as to each of them, but for the contracting union's expulsion from membership, they would not have been under the necessity of tendering a new initiation fee. Since it is uncontraverted that Scheuermann failed to tender an initiation fee within the time proscribed by the 1949 contract, the undersigned finds that in effectuating his discharge, neither of the Respondents violated the Act.

On the other hand, assuming arguendo, in accordance with the General Counsel's contention, that the only duty required of Scheuermann "under the new contract is resumption of payment of dues as a condition for his reacquiring membership," it is clear that the evidence fails to sustain the General Counsel's contentions and argument in this regard. The General Counsel argues that since the Respondent Union on June 3, 1949, returned 3 months' dues

submitted by Scheuermann following his expulsion from membership with the statement "you are, therefore, not a member of the International Association of Machinists and we cannot accept dues from you," the Respondent Union under general principles of contract law "was impliedly obligated to make known to Scheuermann that it would let bygones be bygones and would accept his tender." (Emphasis supplied.) In support of his argument, the General Counsel cites the following proposition:

> Where an act to be done by one party can be done only on a corresponding act being done or allowed by the other party, an obligation by the latter to do or to allow to be done the act or things necessary for the completion of the contract will be necessarily implied.[34]

The General Counsel also relies upon the following principle:

> Insmuch as the "law neither does nor requires idle acts," a strict and formal tender is not necessary * * * where it is reasonably certain that a tender will be refused if made.[35]

In support of his argument, the General Counsel contends that Steward Smiley's refusal to accept Ollis' tender of dues between October 10 and 17, made in Scheuermann's presence, demonstrated the futility of a tender of dues on the part of Scheuermann.

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[34] 17 Corpus Juris Secundum 910.

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[35] 24 Cal. Jur. 513.

The undersigned is of the opinion that the General Counsel's argument in this regard is without merit because it is based upon the false premise that the Respondent Union was obligated to accept the tender of Ollis' dues and, more generally, to admit to membership any applicant subject to the terms of its contract with the Respondent Company.

The terms of the Act do not require the union holding a union-shop contract to accept all applicants for membership and this fact was clearly recognized by the proponents of the Act in the Congress.[36] And the Board has held that proviso B of Section 8 (a) (3) extends "protection to any employee who tenders periodic dues and initiation fees without being accorded membership."[37]

Thus, in order to comply with the union-security provisions of the Respondents' contract, employees who were not members of the Respondent Union were under a duty to tender dues and initiation fees within the proscribed time. Upon receipt of such a tender, the Respondent Union acquired a privilege of either accepting or rejecting the tender.[38] In the

[36]93 Cong. Rec. 4400, A3141.

[37]Union Starch & Refining Company, 87 NLRB 779, 784.

[38]For the purpose of this Report, it is unnecessary to analyze any additional rights or privileges of the Respondent Union; e.g., whether it had a privilege of accepting the dues tendered without extending membership to the employee making the tender. See Senator Taft's statement, 93 Cong. Rec. 5088, 5089.

event an employee's tender of dues and initiation fees was rejected, he acquired a right under the Act that the Respondent Union should not demand his discharge and the Respondent Union was under a corresponding duty not to request his discharge.

Therefore, if these principles are applied to the incident when Steward Smiley rejected Ollis' tender of dues in Scheuermann's presence, the undersigned cannot agree with the General Counsel's argument, even accepting the theory that Ollis or Scheuermann was obliged only to tender dues in order to comply with the Respondents' union-shop contract, that Scheuermann's obligation to tender dues was thereby extinguished. Upon Ollis' tender of dues and their rejection by the Respondent Union,[39] he acquired a right that the Respondent Union should not request his discharge and the Respondent Union assumed a duty that it should not request his termination of employment. This duty in respect to

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[39]For the purpose of discussion, it will be assumed that Smiley's rejection of Ollis' dues was within the scope of his authority as an agent of the Respondent Union and that such action by Smiley was attributable to it. The matter is not free from doubt, however, in view of the requirement of the Respondent Union's constitution that applications for membership be accepted or rejected by vote of the membership body, as well as the fact that no official of the Respondent Union had authority to reject applications for membership and that Smiley's rejection of Ollis' tender of dues was based not upon instruction of the Respondent Union but upon Smiley's belief "if you are not a member you don't have to pay dues, so why should I collect dues if they are not a member?"

Ollis, the Respondent Union observed. Whether Scheuermann was present or far removed at the time of the incident, Ollis' tender did not encompass a tender on the part of Scheuermann and the latter made no effort to comply with his duty to tender dues. He did nothing to fulfill his duty to comply with the union-security provisions of the Respondent's contract and to acquire the protection of proviso B of Section 8 (a) (3).[40] Accordingly,

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[40]The fact that in June, 1949, the Respondent Union returned to Scheuermann 3 months' dues submitted by him after his expulsion from the Respondent Union in March, 1949, can in no way mitigate Scheuermann's duty to tender dues and initiation fees to comply with the union-shop provisions of the contract executed by the Respondents in October, 1949. Nor does the Respondent Union's refusal, subsequent to Scheuermann's discharge, to accept his application for membership affect the conclusions reached herein. Since Scheuermann had failed to acquire the protection of the Act by complying with the union-shop provisions of the contract within the proscribed time, the Respondent Union was free to take any action it wished upon any offers or tenders of Scheuermann after his discharge. Nor do the provisions of the constitution and bylaws of the Respondent Union that reinstatement of expelled members may not be effected until payment of outstanding fines lend any support to the General Counsel's contentions inasmuch as Gorham testified credibly that such provisions may be waived by the Respondent Union. Moreover, upon the record in the instant proceeding, it would be, as the Respondent Union states in its brief, "nothing but idle speculation at its best or a downright perversion of the facts and motives obviously involved in this case, to conclude either (1) that the Union would have refused to admit

the undersigned finds that neither of the Respondents has engaged in violations of the Act as alleged in the complaint in respect to the discharge of Scheuermann.

In view of the foregoing conclusions, the undersigned finds that the evidence warrants no finding that the Respondent Company committed unfair labor practices within the meaning of Section 8 (a) (1) and (3) or that the Respondent Union has engaged in violations of Section 8 (b) (1) (A) or 8 (b) (2) of the Act. It will therefore be recommended that the complaint be dismissed in its entirety.

On the basis of the foregoing and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Westinghouse Electric Corporation (Sunnyvale Plant) is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. International Association of Machinists, Local No. 504, is a labor organization within the meaning of section 2 (5) of the Act.

3. Neither Westinghouse Electric Corporation (Sunnyvale Plant) nor International Association of

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Scheuermann to membership on the same terms and conditions generally applicable to other members, if he had made a tender of his initiation fee within the proper time period, or (2) that the Union would have requested his discharge if he had made a tender, and the Union had rejected it."

Machinists, Local No. 504, has engaged in any of the unfair labor practices alleged in the complaint.

Recommendations

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in the case, the undersigned hereby recommends that the complaint herein be dismissed in its entirety.

Dated at Washington, D. C., this 15th day of March, 1951.

/s/ FREDERIC B. PARKES, 2nd,
Trial Examiner.

United States of America, Before the
National Labor Relations Board

[Title of Causes.]

DECISION AND ORDER

On March 15, 1951, Trial Examiner Frederic B. Parkes 2nd issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief. The Respondent Company also filed exceptions and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no perjudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, briefs and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, but only to the extent that they are consistent with the Decision and Order herein.

1. The Trial Examiner dismissed the complaint insofar as it alleges that the Respondent Union violated Sections 8 (b) (2) and 8 (b) (1) (A) and the Respondent Company violated Sections 8 (a) (3) and 8 (a) (1) of the Act by the discharge of employee Marovich on September 20, 1949, and the alleged attempt to discharge employees King, Pachorik, and Scheuermann on or about September 9, 1949.[1] Contrary to the General Counsel's contentions, the Board is not convinced by the clear preponderance of all the relevant evidence, that the Trial Ex-

[1]These allegations were added to the complaint on motion of the General Counsel made at the hearing 1 year after the alleged occurrence of the unfair labor practices in question. Contrary to the Respondent Company's exceptions, as the alleged unfair labor practices occurred within 6 months of the filing and service of the original charge, these allegations were properly and timely added in the amended complaint. Cathey Lumber Company, 86 NLRB 157, enfd., 185 F. 2d 1021 (C.A. 5); Ferro Stamping & Manufacturing Co., 93 NLRB No. 252.

aminer's credibility findings are erroneous.[2] We shall therefore dismiss the complaint insofar as it alleges such violations.

2. The Trial Examiner found that Scheuermann failed to tender dues and a new initiation fee on or before the termination of the 30 day grace period under a valid union-shop contract and that therefore the Union did not violate Sections 8 (b) (2) and 8 (b) (1) (A) in requesting his discharge. The General Counsel excepts to this finding on the ground that the Union indicated to Scheuermann that his tender would not be accepted thereby extinguishing the duty to tender required by proviso (B) of Section 8 (a) (3) and Section 8 (b) (2). We find merit in the General Counsel's exception.

As more fully described in the Intermediate Report, on March 22, 1949, Scheuermann was fined $500 and expelled from the Union for "dual unionism." In late March, Scheuermann offered Steward Smiley 1 month's dues but Smiley said: "I can't take dues from you. I have been told not to." On June 3, 1949, the Union returned dues payments made by Scheuermann during March and May,

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[2]In so concluding, we do not rely on the Trial Examiner's findings that a conference involving union and respondent officials would not have been held in an office with a door open to the adjoining office of employee Anderson; that Andersen was not a disinterested witness because of her friendship with Scheuermann and employee Ollis; and that "it is indeed curious" that Andersen did not inform the General Counsel of the alleged occurrence until a year later.

stating, "You are * * * not a member of the International Association of Machinists and we cannot accept dues from you."

On October 10, 1949, the Respondents executed a valid union-shop contract, as was known to Scheuermann.[3] Between October 10 and 17, 1949, employee Ollis, who was fined and expelled from the Union at the same time and for the same reason as Scheuermann, offered to pay dues to Smiley in Scheuermann's presence, but Smiley said, "You know I can't take dues from you guys." On November 11, 1949, after the expiration of the contracts' 30 day grace period, the Company discharged Scheuermann at the request of the Union for failing to comply with the union-shop clause of the contract.

On November 14, Scheuermann spoke with Business Agent Scott as follows:

> "I told him I was out to try to * * * see what we could do about my being laid off at Westinghouse, and he said * * * Yes, Clyde, I think we can do something. You pay your back dues and your new initiation fee and the $500 fine * * *"

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[3]In so finding, however, we do not agree with the Trial Examiner that Scheuermann discussed the union-shop provision with Steward Nunez, a finding at variance with Nunez's confused testimony as to the time and substance of the conversation. Nor do we agree with the Trial Examiner that "inherent" in Ollis' offer to pay dues made in the presence of Scheuermann, is knowledge on their part of the union-shop clause. As to this point, the record is clear that Ollis' offer was prompted by taunts of "free rider" and a desire to rejoin the Union.

While the Union's actual violation of Section 8 (b) (2) must begin, if at all, on November 11, 1949, the date of Scheuermann's discharge, we do not agree with the Trial Examiner that events before and after the 30-day grace period under the union-shop provision of the contract may not be considered in assessing the Union's conduct. Section 8 (b) (2) of the Act limits the effect of union shop clauses by protecting employees against discharge upon the request of the contracting union for reasons other than "* * * failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" in the union. Necessarily, therefore, we are concerned herein with the question of whether the reason assigned by the Union in requesting the discharge of Scheuermann, i.e., failure to tender dues and initiation fee, was, in fact, the true reason. Resolution of this question turns largely upon the Union's motive in requesting Scheuermann's discharge. What occurred before as well as that which followed may be as relevant in establishing motive as that which occurred during the critical 30 day grace period.[4]

Thus, in March and June, 1949, before the inception of the union-shop contract, the Union indicated that Scheuermann's offer of dues would not rectify his status as an expellee. Similarly, Smiley, in his rejection of Ollis' offer to pay dues made in the presence of Scheuermann during the 30-day

[4]Ferro Stamping & Manufacturing Co., supra.

grace period, singled out "you guys" as individuals whose good standing in the Union could not be restored by the payment of dues.[5] The Union's attitude toward Scheuermann comported with the provisions of its constitution and bylaws by the terms of which expellees pay a reinstatement fee and, in addition, reinstatement may not be effected until unpaid fines "are remitted or paid in full." That the Union had no intention of remitting the $500 fine and, indeed, considered payment thereof a condition both of Scheuermann's reacquiring membership and maintaining employment at the Respondent's plant, was clearly evidenced by Scott's

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[5]While the Trial Examiner "assumed" that Smiley's rejection of Ollis' offer was within the scope of his authority as agent of the Union, he also indicated that the matter was not "free from doubt." In so observing, the Trial Examiner quoted Smiley's explanation made at the hearing, "if you are not a member you don't have to pay dues, so why should I collect dues if they are not a member." But Smiley's actual statements to Ollis and Scheuermann do not support the implication of his testimony that his rejection was not attributable to the Union. As shop steward whose duties included the collection of dues, Smiley was following union rules on the necessity for reinstatement before dues would be accepted when he stated to Ollis in October, 1949, "I can't take dues from you guys," and to Scheuermann in March, 1949, "I can't take dues from you. I have been told not to." We therefore find that in rejecting Ollis' dues, Smiley spoke as an agent of the Union.

The Trial Examiner's finding that the Union did not request Ollis' discharge because Ollis tendered his dues is rejected. Ollis was laid off prior to the expiration of the 30-day compliance period.

statement following the discharge that Scheuermann pay the fine to regain his job.

In view of the foregoing, we are of the opinion that, in asking the Company to discharge Scheuermann ostensibly because he failed to tender dues and initiation fee, the Union in reality asked for and obtained Scheuermann's discharge because of his nonpayment of the fine, a reason which the Act does not countenance.[6] Consequently, we are convinced that the Union would not have refrained from requesting Scheuermann's discharge even if he had timely offered dues and a new initiation fee.[7] In these circumstances, it was not incumbent upon Scheuermann to fulfill the obligation of "tender" in order to come within the protection of the Act for "a formal tender is * * * unnecessary in cases involving provisio (B) where the circumstances indicate that such a tender would have been a futile gesture."[8]

Our dissenting colleagues misinterpret our decision when they assert that "every employee, who has failed during the grace period" to tender "may now

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[6]The Eclipse Lumber Company, 95 NLRB No. 59; Electric Auto-Lite Company, 92 NLRB No. 171; Pen and Pencil Workers Union, Local 19593, AFL, 91 NLRB No. 155.

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[7]We assume, without passing on the question, that Scheuermann was obligated to "tender" a second initiation fee.

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[8]The Eclipse Lumber Company, supra; The Baltimore Transfer Company, 94 NLRB No. 220.

allege that his discharge was requested for some reason other than this clearly obvious one." The duty to tender is extinguished only where, as in the present case, the union demonstrates by affirmative conduct and statements that tender would not have stayed its request for discharge. Otherwise, of course, an employee has the normal duty to go forward with his tender during the grace period.

Accordingly, we find that by causing the Respondent Company to discharge Scheuermann because he had been denied membership in the Respondent Union on some ground other than his failure to tender the dues and initiation fee uniformly required by the Respondent Union as a condition of acquiring membership therein, the Respondent Union has violated Section 8 (b) (2) of the Act. We further find that by causing the Respondent Company discriminatorily to discharge Scheuermann through the illegal application of its contract, the Respondent Union restrained and coerced employees in the exercise of the rights guaranteed by Section 7, and thereby also violated Section 8 (b) (1) (A) of the Act.

3. We are of the opinon that the Company did not know, or have reasonable grounds to believe that the Union sought Scheuermann's discharge for reasons other than failure to tender dues and initiation fee. Although Industrial Relations Manager Goodenough knew in March, 1949, that Scheuermann was expelled from the Union, there is no indication that Goodenough had reason to believe on

November 11, 1949, when confronted with the Union's request for Scheuermann's discharge, that the Union had refused to accept dues from Scheuermann or was then in any way insisting upon payment of the fine. And while Scheuermann stated to Superintendent McAuliffe on the occasion of his discharge, "You know * * * I was fined and expelled," and McAuliffe replied, "* * * it just wasn't quite right," we are not persuaded therefrom that the Company had reasonable ground for believing that the Union was then demanding Scheuermann's discharge for failure to pay the fine. Indeed, Goodenough inquired of the Union whether the request for Scheuermann's discharge complied with the terms of the contract and whether opportunity for membership was extended to Scheuermann without discrimination. The Union replied in the affirmative. In these circumstances we do not believe that the Company was required to explore the implications of Scheuermann's protestations, a matter which would necessarily lead to unwarranted intrusion in the internal affairs of the Union.

Accordingly, we find that in discharging Scheuermann on November 11, 1949, at the request of the Union, the Respondent Company did not discriminate in violation of Section 8 (a) (3) and 8 (a) (1) of the Act in that it had no reasonable grounds for believing that the Union's request was for reason's other than Scheuermann's failure to tender dues and initiation fee. We shall, therefore, in agreement with the Trial Examiner's result, dismiss the

complaint insofar as it alleges that the Respondent Company committed unfair labor practices.

The effect of the unfair labor practices upon commerce

The activities of the Respondent Union, set forth above, occurring in connection with the operations of the Respondent Company described in Section I of the Intermediate Report, have a close, intimate, and substantial relation to commerce, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent Union has engaged in unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent Union to notify both the Respondent Company and Scheuermann that it has no objection to Scheuermann's immediate reinstatement to his former or substantially equivalent position[9] as an employee of the Respondent Company, without prejudice to his seniority or other rights or privileges. We shall also order the

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[9]The expression "former or substantially equivalent position" is intended to mean "former position whenever possible, but if such position is no longer in existence, then a substantially equivalent position." See The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch, 65 NLRB 827.

Respondent Union which we have found responsible for the discrimination suffered by Scheuermann, to make him whole, as closely as possible, for any loss of pay he may have suffered by reason of the Respondent Union's unlawful conduct.[10]

In accordance with our practice, the period from the date of the Intermediate Report to the date of the Order herein will be excluded in computing the amount of back pay to which Scheuermann is entitled, because of the Trial Examiner's recommendation that the complaint be dismissed.

Accordingly, we shall order the Respondent Union to pay to Scheuermann a sum of money equal to the amount that he normally would have earned as wages from November 11, 1949, the date of the discrimination, to 5 days after the date on which the Respondent Union notifies the Respondent Company and Scheuermann, in accordance with our Order, that it no longer has objection to his immediate reinstatement, less his net earnings[11]

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[10]The absence of any reinstatement order against the Respondent Company in no way affects our power to issue a back-pay order against the Union. National Union of Marine Cooks and Stewards, CIO (George C. Quinly), 92 NLRB No. 147, and cases cited therein.

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[11]By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the Employer, which would not have been incurred but for the unfair labor practices and the consequent necessity of his seeking employment elsewhere. See

during such period.[12]

Consistent with the Board's recently established policy,[13] we shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the date of Scheuermann's discharge to the termination of the Respondent Union's liability, as hereinbefore provided. The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which Scheuermann would normally have earned for each quarter or portion thereof, his net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the backpay liability for any other quarter.

Upon the foregoing findings of fact, and upon the entire record in these cases, the Board makes the following additional:

Crossett Lumber Company, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. NLRB, 311 U.S. 7.

[12]Our back-pay order shall be construed as set forth in Pen and Pencil Workers Union, Local 19593, AFL, supra.

[13]F. W. Woolworth Company, 90 NLRB 289.

Conclusions of Law

1. The Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

2. By restraining and coercing employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

3. The foregoing unfair labor practices engaged in by the Respondent Union are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that International Association of Machinists, Local No. 504, San Jose, California, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Westinghouse Electric Corporation (Sunnyvale Plant), its officers, agents successors, and assigns, to discharge or in any other manner to discriminate against its employees with respect to whom membership in the Respondent Union has been denied or terminated upon some ground other than failure to tender the periodic dues and initiation fees uniformly required

as a condition of acquiring or retaining membership or to discharge or in in any other manner to discriminate against its employees in violation of Section 8 (a) (3) of the Act.

(b) Restraining or coercing employees of Westinghouse Electric Corporation (Sunnyvale Plant), its officers, agents, successors, and assigns, in the exercise of their right to engage in or to refrain from engaging in any and all of the concerted activities guaranteed to them by Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Notify Westinghouse Electric Corporation (Sunnyvale Plant), in writing that it withdraws its objections to the employment of Clyde W. Scheuermann and requests it to offer him immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Notify Clyde W. Scheuermann in writing that it has advised Westinghouse Electric Corporation (Sunnyvale Plant), that it withdraws its objections to his reemployment and requests it to offer him immediate and full reinstatement;

(c) Make whole Clyde W. Scheuermann for any loss of pay he may have suffered as a result of the

discrimination against him in the manner set forth in the section entitled The Remedy;

(d) Post in conspicuous places in its business office at San Jose, California, where notices are customarily posted, copies of the notice attached hereto as Appendix A.[14] Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondent Union's official representatives, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material;

(e) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached hereto as Appendix A for posting, the Employer willing, at its plant in places where notices to employees are customarily posted. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by the Respondent Union's official representatives, be forthwith returned to the Regional Director for said posting;

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[14]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing."

(f) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from the date of this Order what steps it has taken to comply herewith.

It Is Further Ordered that the complaint, insofar as it alleges that the Respondent Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by conduct other than that found to be violative in this Decision and Order, and that the Respondent Company violated Section 8 (a) (3) and 8 (a) (1) of the Act, be, and it hereby is, dismissed.

Signed at Washington, D. C., September 28, 1951.

PAUL M. HERZOG,
Chairman,

JOHN M. HOUSTON,
Member,

JAMES J. REYNOLDS,
Member,

ABE MURDOCK,
Member,

PAUL L. STYLES,
Member,

[Seal] NATIONAL LABOR
RELATIONS BOARD.

John M. Houston, Member, dissenting in part:

I agree that the Union committed unfair labor practices as found by the majority. However, I cannot concur in the finding that the Company did not also violate the Act.

Admittedly, the Company knew in March, 1949, that Scheuermann was expelled from the Union. And while the Company was assured by the Union on November 11, 1949, that its request for Scheuermann's discharge was solely for failure to tender dues and initiation fee, Scheuermann informed McAuliffe on the same day that he was unable to comply with the union membership requirement of the new contract because, "You know * * * I was fined and expelled." McAuliffe replied that he had discussed the matter with Goodenough and "was of the opinion that it just wasn't quite right."

I am unable to construe Scheuermann's remarks to McAuliffe as other than a flat assertion that the Union was then insisting upon payment of the fine as a condition of Scheuermann's reacquiring membership under the new union shop contract. That the Company so construed Scheuermann's comments and, indeed, concurred in his view, was manifested by McAuliffe's admission that, in effect, the Union's discharge request was not as appeared on the surface.

In my opinion, therefore, the conclusion is inescapable that the Company knew or at least had reasonable grounds for believing that the Union's justification for demanding Scheuermann's discharge was mere pretext and that Scheuermann's nonpayment of the fine was in fact the real reason.

Accordingly, I would also find that the Respondent Company violated Section 8 (a) (3) and 8 (a) (1) of the Act.

Signed at Washington, D. C., September 28, 1951.

JOHN M. HOUSTON,
Member,

NATIONAL LABOR
RELATIONS BOARD.

Abe Murdock and Paul L. Styles, Members, dissenting in part:

We do not agree with the majority's decision that the Respondent Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act in requesting the discharge of Scheuermann. Rather we agree with the Trial Examiner that the failure of Scheuermann to take any action between October 10, 1949, and November 11, 1949, to become a member of the Respondent Union, as required by the valid union-security agreement between the Union and the Employer, is fatal to his claim to protection under proviso B to Section 8 (a) (3).

On the basis of the evidence before us we cannot accept the majority's assumption that if the Respondent Union had been approached by Scheuermann during the first 30 days of the contract it would unquestionably have rebuffed him and then insisted on his discharge. For the fact is undisputed that Scheuermann made not the slightest effort to obtain membership in the Respondent Union during the crucial period when the Union was obligated by law

to consider his application without discrimination. We need not guess whether the Respondent Union would have elected to pursue an unlawful course or would have recognized its legal obligations at that time. It was never put to that test. Whatever statements may have been made before and after this period, we cannot agree with the majority that these statements constitute a preponderance of evidence in favor of its finding that the Respondent Union in any event would have acted in an unlawful manner. Nor do we believe that Smiley's statement to Ollis in the presence of Scheuermann to the effect that Smiley could not accept dues from "you guys" was sufficient to relieve Scheuermann from the legal requirement that he himself take some affirmative action to acquire membership in the contracting Union. The futility doctrine upon which the majority and the General Counsel rely has been applied by the Board only under circumstances in which the Union clearly and convincingly made known to the employee concerned during a period when it was under an obligation to accept him on a non-discriminatory basis that it would not do so.[15]

In our opinion, this doctrine should be applied in cases of this nature sparingly and with great care. Applied loosely, it imposes an unwarranted burden upon parties who have executed lawful union-security provisions. As a result of the majority's decision in the instant case unions and employers hereafter act at their peril when they rely upon the

[15]See cases cited in footnote 8.

express language of their contracts, even though they have in good faith followed the detailed and exact requirements of the amended Act. Litigation is openly invited. For every employee, who has failed during the grace period of the contract to seek membership in the contracting union, may now allege that his discharge was requested for some reason other than this clearly obvious one. Every fisticuff adventure between union members may now become the basis to establish an unlawful motive for such a request where a lawful motive exists. We do not think that Section 8 (b) (2) requires this result. We prefer rather to rely upon the presumption, uncontroverted by substantial evidence during the period of its legal obligations, that the Respondent Union has acted in a lawful manner.

For these reasons we would affirm the Trial Examiner's dismissal of the allegations in the Complaint that the Respondent Union has violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

Signed at Washington, D. C., September 28, 1951.

ABE MURDOCK,
Member,

PAUL L. STYLES,
Member,

NATIONAL LABOR
RELATIONS BOARD.

Appendix A

Notice to

All members of International Association of Machinists, Local No. 504, and to all employees of Westinghouse Electric Corporation (Sunnyvale Plant)

Pursuant to

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not cause or attempt to cause Westinghouse Electric Corporation (Sunnyvale Plant) to discharge or in any other manner to discriminate against its employees in violation of Section 8 (a) (3) of the Act, or to discharge or in any other manner to discriminate against employees with respect to whom membership in our union has been denied or terminated upon some ground other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

We Will Not restrain or coerce employees of Westinghouse Electric Corporation (Sunnyvale Plant) in the exercise of their rights to engage in or to refrain from engaging in any or all of the concerted activities guaranteed to them by Section 7, except to the extent that such right may be affected by an agreement requiring membership in

a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will notify Westinghouse Electric Corporation (Sunnyvale Plant) in writing and furnish a copy to Clyde W. Scheuermann, that we have withdrawn our objections to the employment of Scheurman and that we request his reinstatement.

We Will make Clyde W. Scheuermann whole for any loss of pay he may have suffered because of the discrimination against him.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL NO. 504
(Union)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CA-328

In the Matter of:

WESTINGHOUSE ELECTRIC CORPORATION

and

CLYDE W. SCHEUERMANN, an Individual.

Case No. 20-CB-102

In the Matter of:

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504,

and

CLYDE W. SCHEUERMANN, an Individual.

Room 634, Pacific Building,
821 Market Street,
San Francisco, California

Tuesday, September 5, 1950

PROCEEDINGS

Pursuant to adjournment, the above-entitled matter came on for further hearing at 10 o'clock a.m.
Before: Frederic B. Parkes, II,
Trial Examiner.

Appearances:

HARRY BAMFORD, ESQ.,

Pacific Building, 821 Market Street,
San Francisco, California,

Appearing on Behalf of the General Counsel, National Labor Relations Board.

SAMUEL L. HOLMES, ESQ.,
MESSRS. BROBECK, PHLEGER & HARRISON,

111 Sutter Street,
San Francisco, California,

Appearing on Behalf of Westinghouse Electric Corporation, the Respondent Company.

A. C. McGRAW,
Grand Lodge Representative,

306 Pacific Building,
Oakland 12, California,

Appearing on Behalf of International Association of Machinists, Local No. 504, the Respondent Union.

* * *

Mr. Bamford: Yes, sir. At this time I should like to offer in evidence the formal documents in the case, which I have marked for identification as follows:

General Counsel's 1-A, a copy of the original Charge in Case No. 20-CB-102; 1-B, Affidavit of Service of G.C. 1-A, with return registry receipt attached; 1-C, a copy of the original Charge in Case No. 20-CA-328; 1-D, Affidavit of Service of G.C. 1-C with return registry receipt attached; 1-E, the original Charge in 20-CB-102; 1-F, the original Charge in 20-CA-328; 1-G, the Consolidated Complaint; 1-H, Order Consolidating Cases and Notice of Consolidated Hearing; 1-I, Affidavit of Service of G.C. 1-E through 1-H; 1-G, Answer filed by Respondent Company, Westinghouse. Attached thereto is a document which purports to be a contract between Respondent Company and Respondent Union and the offer in evidence made by General Counsel of G.C. 1-J does not contemplate that the Answer—rather that the contract appended to the Answer be admitted in evidence for any purposes except as explanatory [10*] to the Answer; 1-K, the Answer filed by Respondent Union; 1-L, the Order Rescheduling Hearing; 1-M, the Affidavit of Service of 1-L with return registry receipts attached.

Mr. McGraw: The Union has no objections to the admission of these documents.

Mr. Holmes: I object to the offer of 1-J on the ground that the General Counsel is attempting to

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

delete part of the Company's Answer. He should either offer the entire Answer or none at all. The contract attached to the Answer as an Exhibit is pleaded in the Answer as part of the Answer by reference to it in the body of the Answer. You can't delete the contract without deleting part of the Answer, and I object to an offer of part of the Answer. It must either be offered in toto or not at all.

Mr. Bamford: If I may answer, the entire document is itself attached; however, by my offer I do not wish to underwrite the foundation or the validity of the contract, but merely wish to state that the offer is made in the form of a pleading rather than the offer on an Exhibit.

Mr. Holmes: Obviously the Exhibit is part of the pleading. The first paragraph of the Answer reads: "Prior to the tenth day of October, 1949, Westinghouse Electric Corporation negotiated a collective bargaining agreement with International Association of Machinists, District Lodge 93, Local 504, which said agreement was executed on the tenth day of October, 1949. [11] A copy of said agreement is attached hereto, marked Exhibit 'A' and by this reference made a part hereof;" So that is as much a part of my Answer as though I had somebody copy the entire document in the Answer, so it cannot be excluded from the Answer without excluding the whole thing.

Trial Examiner Parkes: Well, are you taking the position that the contract should be stricken from his Answer, a motion to strike?

Mr. Bamford: If the pleader feels that the contract is relevant—and I believe it is—to his pleading, I would not move to strike the Answer. However, I don't want to be in the position of having the contract itself go into evidence for all purposes at this time without proper foundation.

Trial Examiner Parkes: Well, I think it is a part of the pleadings, what I would call the pleadings in the case. I did examine them last week.

Mr. Holmes: I think Mr. Bamford is a bit mistaken about this offer he is making. When he offers my Answer, he is offering my denial, and I don't expect that he is offering to prove everything that I have—or prove my denial. That is, of course, contradictory to his offer of the Complaint. I think he is just mistaken about the purport of his offer. He is simply making this pro forma offer in order to get these matters before the Trial Examiner. I can offer the Answer just as well as he, and if he doesn't want to offer my Answer, [12] then I shall.

Trial Examiner Parkes: It is just customary for the Answer of any Respondent to be included in the formal exhibits offered by the General Counsel at the outset of the hearing.

The formal pleadings, consisting of documents numbered for identification as 1-A through 1-M, are received in evidence.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 1-A through 1-M for identification and received in evidence.)

Mr. Bamford: Next, I should like to direct the Examiner's attention to paragraph I of the Complaint, which sets forth certain commerce facts as allegations of the Complaint. Respondent Company's Answer neither admits nor denies paragraph I; hence, I assume that it may be deemed to be admitted by failure to meet the allegations. Respondent Union's Answer, however, by paragraph I, pleads lack of knowledge. Now, it is my understanding that the parties will stipulate that if witnesses were called, that they would testify to the facts contained, or rather alleged in paragraph I of the General Counsel's Complaint. [13]

* * *

Mr. McGraw: Yes, I will so stipulate.

* * *

Mr. Holmes: We are prepared to stipulate that those same facts are true with respect to the year 1949. Do you want to make it more recent?

Mr. Bamford: As amended, is that stipulation acceptable?

Mr. McGraw: Yes, we will stipulate, we will accept that stipulation and join in it.

Trial Examiner Parkes: Very well, gentlemen.

Mr. Bamford: Will the Company also stipulate that the allegation in paragraph II that the Respondent Union is a [14] abor organization is correct?

Mr. Holmes: Sometimes, I am inclined to think it is a political organization, but I will enter into the stipulation.

* * *

Mr. Bamford: I think that the meaning of paragraph XI is clear in its intent, although I will concede that the paragraph may contain certain ambiguities. If the Counsel for the Respondent Company wishes, the General Counsel will undertake orally to amend the Complaint at this time to remove any possible ambiguity as follows:

The aforesaid acts of Westinghouse as set forth in paragraph V above, constitute unfair labor practices within the meaning of Sections 8 (a) (1) and 8(a) (3) and Sections 2(6) [15] and 2(7) of the Act, and aforesaid acts of the Union as set forth in paragraph IV above, and each of them, constitute unfair labor practices within the meaning of Sections 8 (b) (1) and 8 (b) (2) and Section 2 (6) and (7) of the Act. The final wherefore paragraph may stand in this motion to amend.

Trial Examiner Parkes: Does the motion satisfy your objections, Mr. Holmes?

Mr. Holmes: I think if the Complaint is amended in that respect it will be clear.

Trial Examiner Parkes: Any objection, Mr. McGraw?

Mr. McGraw: Well, I think there are probably many reasons why it should be dismissed on other grounds, although I doubt that this is the proper time to make such a motion.

* * *

CLYDE W. SCHEUERMANN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford:

* * *

Q. At any time were you ever employed by Westinghouse Electric Corporation in Sunnyvale?

A. Yes.

Q. Are you employed there at the present time?

A. No.

Q. When did your employment with Westinghouse terminate? A. November the 11th.

Q. And what year was that? A. 1949.

* * *

Q. How long have you worked at the Sunnyvale plant, Mr. Scheuermann?

A. I was employed there by the former company, Hendy, I believe it was June, 1941, and when Westinghouse took over, I continued in employment.

Q. And at the time of your termination, what was your job with Westinghouse?

A. I was a journeyman machinist on assembly.

Q. What shift were you working?

A. Swing shift.

Q. And who was your immediate supervisor in that occupation? A. Frank Judd.

Q. Now, during any time while you were at Westinghouse, and [17] prior to that at Hendy, were you a member of Machinists Local 504?

(Testimony of Clyde W. Scheuermann.)

A. I wasn't listening. Would you repeat that? (Question read.)

The Witness: Yes.

Q. (By Mr. Bamford): When had you first joined the Machinists? A. In 1941.

Q. Now, in the spring of 1941 were you expelled from the Machinists? A. I was, yes.

* * *

Q. Now, in 1949, the first part of that year, had you become active on behalf of another labor [18] organization? A. Yes.

Q. What was the name of that labor organization?

A. Independent Westinghouse Workers Union.

Q. Did you hold an office in that organization?

A. Yes.

Q. And what was that office?

A. President.

Mr. McGraw: Well, Mr. Hearing Officer, I am going to object to the entire line of questioning here, on the ground, frankly, that such information is immaterial to the issues involved in this case. It doesn't make any difference whether we did or did not expel him, nor does it make any difference what the reasons were. It still doesn't go to the point of the charges and to the Complaint. Certainly there is a field of inquiry which we think is privileged and which the Act admits, and that is that the rules and regulations of a union as to its conditions for membership are not to be affected by this particu-

(Testimony of Clyde W. Scheuermann.)

lar law, and so the aspect of going into these things that don't go to the point at issue, opens up a field of inquiry which we think broader than necessary insofar as these particular charges are concerned. We have admitted in our Answer, actually, the fact that he was discharged for cause. If now it becomes necessary that we must prove that we had good cause, it is all right with us, but frankly we [19] think that it is immaterial and irrelevant, and the relationship of this man to this union is none of the Board's business, whether you have charges before it or not, and no matter what the charges are. The question comes down, frankly, to whether or not within a short period of time this man offered to pay dues or whether he didn't, or whether or not he made an application for reinstatement or whether or not he didn't, and those are the only facts that have any bearing on the charges here.

Mr. Holmes: I join in Mr. McGraw's objection, not necessarily on all of the same grounds, but certainly on the ground that in point of time these matters that Mr. Bamford is presently going into are immaterial and irrelevant. They occurred—he is talking about things that occurred in the spring of 1949, and the acts complained of in the Complaint, or the act complained of took place on November 11th, so it would be eight or nine months later, and certainly unless there is some preliminary tieing in of these various occurrences, I think that acts which occurred in the spring of 1949 are immaterial.

(Testimony of Clyde W. Scheuermann.)

Trial Examiner Parkes: Mr. Bamford?

Mr. Bamford: Well, I shall treat the joint and several objections of Respondents as anticipating my next question—I believe there is presently no question before the witness—and argue on that basis. The proviso, the second proviso to Section 8 (a) (3) of the Act reads: [20]

"That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

* * *

Mr. Bamford: One, it certainly is enlightening and background evidence; two, the testimony of this witness will [21] certainly establish that the witness' further testimony is inherently credible and that the Respondent Union bore him a long-standing grudge. The expulsion and the fine from the union set up the picture of what later occurred. Hence, I think it is very relevant.

Mr. Holmes: I never heard of any justification for testimony on the ground it is going to make something that the witness says later credible.

(Testimony of Clyde W. Scheuermann.)

Trial Examiner Parkes: Objections overruled. I believe it is proper examination in this line for the General Counsel's case. However, we are not here trying the merits for the witness' expulsion from the union, if indeed he was expelled from membership in the union. That is simply a fact that Mr. Bamford must show in order to carry out his theory of the case, but we are not going into the merits of that expulsion, again as I say, if he was expelled. I do not know.

Mr. Bamford: I intend to pursue it no further. I just merely asked the witness a preliminary question to explain how he got in trouble with the Respondent Union; the nature of that trouble will not be explored any further.

Mr. McGraw: Mr. Trial Examiner, do I understand your ruling to mean that Mr. Bamford is now free to proceed to try and prove a grudge? By his own statements he said that he wanted to go into this to show that there was a grudge and that was material to him. [22]

Trial Examiner Parkes: Well, he made that statement. We will wait until he continues with the examination to see whether that issue is raised.

Q. (By Mr. Bamford): Now, in March of 1949 were you notified by the Respondent Union, Local 504, I.A.M., of charges that had been placed against you by that union?

Mr. McGraw: Objection.

Mr. Holmes: May I have a continuing objection to this line?

Trial Examiner Parkes: You may, sir.

(Testimony of Clyde W. Scheuermann.)

Mr. Bamford: Did you hear the question?

Trial Examiner Parkes: Mr. McGraw has an objection.

Mr. McGraw: I object, Mr. Hearing Officer. We have already admitted in our Answer that he was expelled for cause. I don't see why we have to go beyond that particular admission, and we actually certainly appear to be going into his trial, and the reasons for it, and I renew my objection that the entire line and this particular question is immaterial and irrelevant and shouldn't be gone into.

Trial Examiner Parkes: Well, I assume the position of Mr. Bamford is that this is material in that it may cast light upon the knowledge of the company as to the reason for the expulsion of Mr. Scheuermann.

Mr. Bamford: That is correct, sir, and the motive underlying the union's request for his discharge to the company. [23]

Mr. Holmes: You say that goes to prove knowledge of the company?

* * *

Q. (By Mr. Bamford): In March, 1949, were you notified by Local 504 that charges had been placed against you? A. I was. [24]

Q. Now, I show you what purports to be two letters to you from Local 504, both dated March 4, 1949, and ask you if you can identify these documents as having been received by you?

A. Yes, I received those.

(Testimony of Clyde W. Scheuermann.)

Mr. Bamford: May they be marked for identification as General Counsel's exhibit next in order?

Mr. Holmes: Which is which?

Mr. Bamford: Well, I shall ask the reporter to mark the letter signed by Babcock with the attachment as General Counsel's Exhibit 2 for identification, and the letter signed by the Trial Committee as General Counsel's Exhibit 3 for identification.

(Thereupon the documents referred to were marked General Counsel's Exhibits Nos. 2 and 3 for identification.)

Trial Examiner Parkes: Are you offering them at this time?

Mr. Bamford: At this time General Counsel's Exhibits 2 and 3 for identification are offered in evidence.

Mr. McGraw: We object on the ground it is irrelevant and immaterial and doesn't go to any of the issues in the case.

Mr. Holmes: I object to the documents also on the ground they are incompetent, irrelevant and immaterial; they have no bearing upon any of the issues raised in the Complaint against the company and there is no proof that the company had [25] knowledge of these documents.

Trial Examiner Parkes: The objections are overruled. General Counsel's Exhibits 2 and 3 are received in evidence.

(The documents heretofore marked General Counsel's Exhibits Nos. 2 and 3 for identification were received in evidence.)

(Testimony of Clyde W. Scheuermann.)

GENERAL COUNSEL'S EXHIBIT No. 2

International Association of Machinists

Local No. 504
P. O. Box 311
San Jose 2, California
45 Santa Teresa St., Room 208

March 4, 1949

Registered
Mr. Clyde Scheuermann
177 So. 26th St.
San Jose 2, Calif.

Dear Sir and Brother:

In compliance with Article K, Section 1 of the Grand Lodge Constitution, you will find enclosed a copy of the charges filed against you by Business Agent Gorham relative to your having violated Article 24, Section 2 of the Grand Lodge Constitution.

Fraternally yours,

RAY BABCOCK,
President.

CD:ja
enc. (2)

(Testimony of Clyde W. Scheuermann.)

(Copy)

45 Santa Teresa St.
Room 208
March 4, 1949

Machinists' Local 504, I. A. of M.
45 Santa Teresa St., Room 208
San Jose, California

Attn.: Mr. Ray Babcock, Pres.

Dear Sirs and Brothers:

I am hereby formally filing charges against Brother Clyde Scheuermann.

I charge that Brother Clyde Scheuermann has violated Article XXIV, Section 2 of the Grand Lodge Constitution.

Fraternally yours,

F. W. GORHAM,
Asst. Business Agent.

FWG:ja
cc: Clyde Scheuermann
Trial Committee

Received in evidence September 5, 1950.

(Testimony of Clyde W. Scheuermann.)

GENERAL COUNSEL'S EXHIBIT No. 3

International Association of Machinists
Local No. 504

San Jose 2, California
45 Santa Teresa St., Room 208

March 4, 1949

Registered
Mr. Clyde Scheuermann
177 So. 26th St.
San Jose 2, Calif.

Dear Sir and Brother:

This is to advise you that a hearing will be held with a Trial Committee relative to the charges preferred against you by Business Agent Gorham.

Your presence is requested at said trial in order to have all the facts clearly submitted and an impartial and fair decision rendered by the Trial Committee.

Said meeting will be held on Tuesday, March 8, 1949, at 8:00 p.m. in the Machinists' Office, Room 207, 45 Santa Teresa St., San Jose, California.

Fraternally yours,

TRIAL COMMITTEE,
LOCAL 504, I. A. of M.

HENRY SMITH,
JOHN BENTZ,
HARRY LAWRENCE.

Received in evidence September 5, 1950.

(Testimony of Clyde W. Scheuermann.)

Q. (By Mr. Bamford): Now, General Counsel's Exhibit 3 requests your presence at a meeting on Tuesday, March 8, 1949, so that you may appear —so that you might have appeared, to be at a trial mentioned in the letter.

Did you, in fact, attend a trial of that nature?

A. No.

Q. Did you notify the union or request the trial be postponed or set differently?

A. Yes. I wrote a letter requesting that it be held over to some time more convenient, because I worked the swing shift at the time it was held.

Mr. Bamford: Can you hear him? I think you can speak a little louder, please.

Q. (By Mr. Bamford): Did you receive a reply to your letter? A. No.

Q. Now, sometime later, did you receive a communication from the union that you had been expelled and that a fine of $500.00 had been lodged against you? A. I did. [26]

* * *

Q. (By Mr. Bamford): Now, I show you what purports to be a letter from Local 504 to you, dated May 12, 1949, and ask you if you can identify it as having been received by you?

A. Yes, I received it.

* * *

Trial Examiner Parkes: The objections are overruled. General Counsel's Exhibit 4 is received in evidence.

(Testimony of Clyde W. Scheuermann.)

(The document heretofore marked General Council's Exhibit 4 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 4

International Association of Machinists
Local No. 504
San Jose 2, California

Room 208, Labor Temple,
45 Santa Teresa Street.
May 12, 1949.

Registered
Mr. Clyde Scheuermann,
177 So. 26th St.,
San Jose, California.

Dear Mr. Scheuermann:

Please be advised that we have been informed by General Secretary Treasurer Eric Peterson that the $500.00 fine imposed against you by Lodge 504 has been approved by the Executive Council and that the Grand Lodge records have been indicated to show that you have been fined the sum of $500.00 and expelled from membership.

Very truly yours,

/s/ JAMES LeBLANC,
Res. Secy.

/as

Received in evidence September 5, 1950.

(Testimony of Clyde W. Scheuermann.)

Q. (By Mr. Bamford): Now, at or about the time of the trial and your expulsion from the union, had you been paying dues to the I.A.M.?

A. Yes, I was. [27]

Q. On a still later occasion were those dues returned to you? A. They were.

Q. Now, I show you what purports to be a letter from Local 504 to you, dated June 3, 1949, which returns certain dues and which states that, "We cannot accept dues from you," and I shall ask you if you can identify this document as having been received by you?

A. Yes, I received that.

* * *

Trial Examiner Parkes: The objections are overruled. [28] General Counsel's Exhibit No. 5 is received in evidence.

(The document heretofore marked General Counsel's Exhibit No. 5 for identification, was received in evidence.)

(Testimony of Clyde W. Scheuermann.)

GENERAL COUNSEL'S EXHIBIT No. 5

International Association of Machinists
Local No. 504
San Jose 2, California

Registered

Room 208, Labor Temple,
45 Santa Teresa Street.
June 3, 1949.

Mr. Clyde W. Scheuermann,
Star Route,
Alma, California.

Dear Mr. Scheuermann:

Enclosed you will find your money order for $2.00 which was recently sent to Local 504. Also a money order for $4.00, $2.00 of which was sent in the last of March and $2.00 the first of May.

As you know, in accordance with the Constitution, the members of Lodge 504 voted to expel you on March 16, 1949. The General Secretary Treasurer of the International Association of Machinists advised Lodge 504 in a letter dated April 28, 1949, that the Executive Council of the International Association of Machinists had concurred with the action of Lodge 504 in expelling you and fining you the sum of $500.00 for violation of the Constitution of the International Association of Machinists. You

(Testimony of Clyde W. Scheuermann.)

are, therefore, not a member of the International Association of Machinists and we cannot accept dues from you.

Very truly yours,

/s/ A. J. PIEROTTI, F.S.

encs.

Received in evidence September 5, 1950.

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* * *

Q. (By Mr. Bamford): Now, you stated, I believe, Mr. Scheuermann, that you were discharged on November 11, 1949, is that correct?

A. Yes.

Q. From whom did you first hear of that discharge? A. From Mr. McAuliffe.

Q. And was he a superintendent at Westinghouse?

A. Yes, something like that. What is your title?

Mr. McAuliffe: That is about right. [29]

* * *

Q. (By Mr. Bamford): Now, where did you see Mr. McAuliffe? A. In his office. [30]

* * *

Q. Now, what was said and by whom during that conversation?

A. I think Mr. McAuliffe started the conversa-

(Testimony of Clyde W. Scheuermann.)

tion by saying he had a letter from the union. He said, "I will read it to you and then I will let you read it." He read the letter to me and then he handed it to me.

Q. And then did you read it? A. I did.

* * *

Q. Now, I show you what purports to be a [31] letter from District Lodge 93, I.A.M. to Mr. B. H. Goodenough, Manager, Industrial Relations, Westinghouse Electric Corporation, dated November 11, 1949, and ask you if you can identify this as the letter which you have just spoken about?

A. That is correct. [32]

* * *

Q. Can you tell me, please, Mr. Scheuermann, whether the name of Louis G. Gennai had been deleted at the time the letter was shown to you?

A. This is the way it was when I saw it.

Q. With the deletion and the pencil corrections, is that [33] correct—I mean the ink corrections?

A. Yes.

Mr. Bamford: General Counsel's Exhibit 6 is offered in evidence.

* * *

Trial Examiner Parkes: Very well. General Counsel's Exhibit 6 is received in evidence, and you may substitute a copy for the original.

(The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

(Testimony of Clyde W. Scheuermann.)

GENERAL COUNSEL'S EXHIBIT No. 6

(Copy)

November 11, 1949.

Mr. B. H. Goodenough,
Manager, Industrial Relations,
Westinghouse Electric Corporation,
Sunnyvale, California.

Dear Mr. Goodenough:

We are requestiong Westinghouse Electric Corporation, Sunnyvale plant, to terminate the employment of [Name deleted*] Cleveland A. Norris and Clyde W. Scheuermann for failure to comply with Section 2 of the Agreement between Westinghouse Electric Corporation, Sunnyvale plant, and District Lodge #93, International Association of Machinists.

Very truly yours,

F. W. GORHAM,
Asst. Business Representative.

FWG:as

Copy to G.C.M. 11-17.

Received in evidence September 5, 1950.

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*Deletion O.K'd by C. Schwartz 11/11/49.

(Testimony of Clyde W. Scheuermann.)

Mr. Holmes: Be sure it is conformed. [34]

Q. (By Mr. Bamford): Now, after he had read the letter—rather, after Mr. Goodenough had read this letter to you and you had read it to yourself, was there any further conversation between you—Correction, Mr. McAuliffe.

A. Yes. After he read the letter, he said, "I have a copy of the agreement here. I will read the section—it refers to you and you may read it." So he read it to me and then I read that section two I believe it was——

Mr. Holmes: Section what?

The Witness: Section 2, I believe it was.

Q. (By Mr. Bamford): Now, I show you—rather, I direct your attention to Section 2 of the purported contract between the union and the company, which is attached as Exhibit A to General Counsel's Exhibit 1-J, which section purports to relate to union security, and I shall ask you to examine that and then tell us if that is the section which you and he read?

A. The wording, I am sure, is the same. It is not the same document.

Q. But that was the wording that appeared in the document which he showed to you, is that correct? A. That is right. [35]

* * *

Q. Now, after you had read Section 2, was there any conversation between you and Mr. McAuliffe?

A. Yes. I said, "But I don't believe this applies

(Testimony of Clyde W. Scheuermann.)

in my case," and he referred to the agreement and pointed to the line, and he said, "You mean this part?" and I took it from him and looked at it and I said, "Yes."

Q. Now, what part was that? Would you like to look?

A. Yes. It's something about equal rights. Where it said: "Provided, however, that the union shall not request the company to discriminate against any employee for non-membership in the Union if such membership is not available to the employee on the same terms and conditions generally applicable to other members, or if membership is denied or terminated for reasons other than the failure of the employee to tender the periodic dues or initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership."

Q. And——

A. That is the part he referred to.

Q. That is the section he referred to, is that correct? A. That is right. [36]

* * *

Q. Who was it that referred to that specific part of the section, you or Mr. McAuliffe?

A. When I finished reading the section I handed it back to Mr. McAuliffe and when I said, "I don't believe it refers to my case," he handed it over the table and said, "You are referring to this part of it?"

(Testimony of Clyde W. Scheuermann.)

Q. And that was the part you just read?

A. Then he reread it and I said, "Yes, that is what I referred to."

Q. Was there anything further said?

A. Yes.

Q. What was it?

A. He told me of how he happened to pick up the letter that day. He said he had been to Mr. Goodenough's office; Mr. Gorham presented the letter, and he said he talked to Ben about it and he was of the opinion that it just wasn't quite right, but he said Ben assured him that he had asked Mr. Gorham the three necessary questions and as far as he was concerned, why, they were going to abide by the agreement. [37]

* * *

Q. When he referred to Ben, who did he mean, if you know? A. Mr. Goodenough.

Q. And what was Mr. Goodenough's job?

A. Public Relations, I believe.

Q. Was he connected with the employment office in any way?

A. Well, you have got me confused. The employment office was Mr. Kelly, but it seems to me that Mr. Goodenough is over [38] and above Mr. Kelly, I believe. Whether he is Public Relations or not, I don't know.

Q. You don't know his exact title?

A. No.

Q. Is Mr. Goodenough present here in this hearing? A. Yes.

(Testimony of Clyde W. Scheuermann.)

Q. And is Mr. McAuliffe here present at the hearing? A. Yes.

Q. Now, you also mentioned in this last testimony a Mr. Gorham. Who was he?

A. Assistant Business Agent, I think, of Lodge 504.

Q. Now, was there anything further said in this conversation with Mr. McAuliffe?

A. Mr. McAuliffe said that "I don't think they can make it stick, do you?" and I said, "No, I don't," with that, there was—well I won't elaborate.

Q. Well, tell us what you remember Mr. Schueermann.

A. Well, with that there was some lull, a lull in our conversation, and finally I broke the silence by asking, "Well, what do you expect me to do?" He said, "Well, they have asked me to terminate you and we are going to go through with it." Then he advised me how to go about it, and also asked me if I would try to clear out that night, out of the shop. [39]

* * *

Q. Now, did you return to the company on Monday? A. I did.

Q. Prior to that, however, did you go to the I.A.M. office [40] to see if you could get things fixed up? A. Yes, I did.

Q. And where is the I.A.M. office?

A. In San Jose.

Q. And what did you do there?

A. First I went to the desk and told the girl I

(Testimony of Clyde W. Scheuermann.)

wanted to make application for the union shop in Sunnyvale, and she gave me the blanks. I started to fill them out and she stapled them, and then she went to a set of files and I knew that she wasn't familiar with me when she did that, I knew she wasn't familiar with who I was or what my case was because she immediately went into Mr. Scott's office, the business agent, and when she returned, she said—she took the papers from me and wadded them up and threw them in the waste basket and said, Mr. Scott wanted to see me.

Mr. Holmes: I didn't hear his answer, the end of that answer. I am sorry.

Trial Examiner Parkes: Please read it.

(Answer read.)

Q. (By Mr. Bamford): Now, while you were there in an attempt to sign this application——

Mr. Holmes: I object to that. Mr. Bamford is again characterizing what the witness did. Let the witness testify. Don't characterize for him. I think that the question should simply ask for facts. [41]

Mr. Bamford: I will withdraw the question, but I would appreciate it if Counsel would let me conclude the question before objecting to it.

Q. (By Mr. Bamford): While you were there at the desk with the girl, was there anyone else present?

A. Yes, some other machinist walked in and apparently she knew him——

Mr. McGraw: I move to strike "apparently she

(Testimony of Clyde W. Scheuermann.)

knew him." that is obviously a conclusion of the witness.

Mr. Holmes: Let him finish.

Mr. McGraw: I thought he had finished.

Trial Examiner Parkes: Let him finish his answer.

The Witness: Apparently she knew him, because he said "What is this, a new one?" and she said, "Today is the deadline, you better sign one." I don't know who he was or haven't seen him since.

Mr. McGraw: Is that all of your answer?

The Witness: That is all, yes.

Mr. McGraw: I move to strike the entire answer as being a conclusion of the witness and hearsay. It has no bearing on the issues of the case.

Mr. Bamford: Well, I will join in that motion so far as the phrase "apparently she knew him," is concerned. The rest of the answer, I think is relevant and I believe it may stand. [42]

Trial Examiner Parkes: The phrase "apparently she knew him," may be stricken; the remainder of the answer may stand.

Q. (By Mr. Bamford): Did you recognize this other fellow as an employee at Westinghouse?

A. No, I did not.

Q. You had never seen him before, is that correct? A. No.

Q. Well, did you, after she had said that Mr. Scott wanted to see you, did you see Mr. Scott?

A. I did.

Q. Whereabouts? A. In his office.

(Testimony of Clyde W. Scheuermann.)

Q. And what was Mr. Scott's job?

A. He is Business Agent of 504.

Q. Is he Gorham's superior?

A. I believe that is the arrangement.

Q. Was there anyone else present when you saw Mr. Scott? A. No.

Q. What was said and by whom during this conversation?

A. I told Mr. Scott what I was there for and to try and see if there wasn't some way that some misunderstanding—or, some way it could be rectified, if I had overlooked any obligation and he said, "Well, Clyde, I think it can be fixed up all right if you pay your initiation fee and your dues and your $500 fine." When he said the $500 fine, that is—I kind of [43] laughed and I said, "Oh yeah?" and he said, "Well, I will tell you Clyde, I haven't followed the case." He said, "Frank has been on this. I will tell you what I will do, I will make you an appointment for anytime you say." So we decided on an appointment the next day at 10:00 o'clock.

Q. And by "Frank," he meant Frank Gorham, is that correct? A. Yes.

Q. Now, did that end the conversation with Mr. Scott? A. That did, yes.

Q. And then after this visit to the I.A.M. office, did you then go to the Westinghouse plant?

A. I did. [44]

* * *

(Testimony of Clyde W. Scheuermann.)

Q. Well now, after you had gone to the Westinghouse plant, did you see any Westinghouse official there concerning your discharge?

A. Yes, I saw Mr. Goodenough.

Q. And is that the same Mr. Goodenough of whom you have previously spoken?

A. That is right.

Q. Where did you see him?

A. In his office at the plant.

Q. Now, was there anyone else present?

A. No one. His secretary was in an outer room, in an adjoining room.

Q. Now, as best as you can remember, what was said and by whom during this conversation with Mr. Goodenough?

A. After preliminary hellos, I told Ben that I had been down to see Gorham or to see Scott and what had taken place. I told him I had an appointment with Gorham for the next day. I asked [46] him if there wasn't something that could be readily fixed up between us rather than to have it go this far. We talked about the fact—the letter that the union had sent, and he said he had asked Mr. Gorham the necessary questions, and when the agreement was written, he said, he made it very specific that it could be written—that section should be written word for word with the Taft-Hartley law. I told him that I didn't think it was much of a square deal on my part since I had no way of knowing what the conditions of the agreement were. He said, "Well, you were at union meetings." I

(Testimony of Clyde W. Scheuermann.)

said, "Yes, but we hardly go"—I believe I said, "Did you ever try to go to a union meeting after you were fired and expelled." I said I thought I should have some way of knowing what conditions I was working under. He said, "Well, after all, we are a big—got a lot of employees and we can't go around and tell everyone what their particular conditions are." After telling him that I had an appointment with Mr. Gorham for the next day, he asked me if I minded stopping in to see him after the appointment. I told him that I would. Outside of that it was a general conversation, goodbye, and I know he told me that he was there—I thanked him for his time and he told me he was there to assist me anytime, that was his job as a personnel director, to meet the public.

You still can't hear me, I guess. My voice is terrible.

Q. Now, prior to the conversation you had with Mr. McAuliffe, [47] had you ever seen a copy of the purported contract between the company and the Machinists? A. No, I hadn't.

Q. Did you know of its existence? A. No.

Q. Had the company at any time informed you of the existence of the contract? A. No.

Q. Had the union spoken to you about it?

A. No they had not.

Q. Were there any rumors about the plant which would lead you to conclude that the contract, in fact, had been signed?

A. There were rumors, yes. Working the swing

(Testimony of Clyde W. Scheuermann.)

shift, there were many rumors about whether the contract was signed and if it had been signed, what was in it, and being interested in union matters, I was trying to delve out what might be in the agreement, but nobody in our shift seemed to know anything about it.

Q. Did you keep your appointment with Gorham the following day on Tuesday? A. I did.

Q. And where did you see him?

A. In San Jose, at the hall, the union hall.

Q. Whereabouts in the hall did you see him?

A. At his desk. [48]

Q. Was there anyone else present?

A. The girls were in the background there. That was all.

Q. Did you have a conversation with Gorham?

A. Yes.

Q. And what was said, and by whom, during this conversation?

A. I very briefly told him why I was there and asked him if there wasn't — if I couldn't make application to abide by the union shop, and he said, "Clyde, I can't do that. You haven't got a job." And I said, "Is that your answer?" He said, "Yes," and I walked away.

Q. Did you return to the plant on any occasion after you had spoken to Gorham?

A. Yes, I called back to see Mr. Goodenough, as I said I would.

Q. And where did you see Mr. Goodenough on this occasion? A. In his office.

(Testimony of Clyde W. Scheuermann.)

Q. Was there anyone else present?

A. No.

Q. Was this the same day, Tuesday?

A. Yes. These dates, Monday and Tuesday—I know it was the following day. I cannot say whether it was the 29th or place the date at that time because it is all too far back in the background.

Q. Well, either the same day or within a day or so after you had seen Gorham, you saw Goodenough again, is that correct?

A. No, I saw Goodenough the same day. I went directly to his [49] office.

Mr. Holmes: I didn't hear the last of that.

The Witness: I went directly from Mr. Gorham.

Q. (By Mr. Bamford): And what was said and by whom during this second conversation with Mr. Goodenough?

A. I said I had been in to see Frank and he said—asked what answer I got and I told him the answer. I don't think he expressed any opinion whatever, just nodded his head, as much as to say, "I thought so." We talked——

Mr. Holmes: Are you through?

The Witness: What?

Mr. Bamford: He started again Counsel.

Mr. Holmes: If he is through with that answer, I would——

Trial Examiner Parkes: Let him finish the answer, then you can state your objection.

(Testimony of Clyde W. Scheuermann.)

Mr. Holmes: Yes.

Trial Examiner Parkes: Go ahead.

The Witness: Then we spoke again of the same thing we had talked about the day before. I still thought there should be a way—I asked him if there had been any comments about my work or any lack of cooperation since the election was over. He assured me that there hadn't been, but in the eight years I had worked there, if there had been anything wrong with my work the company would find a way to get rid of me. He said the management generally does. So just before I left, I asked [50] him if he had an agreement, a copy of the agreement or something—I would like to have it, I would like to know what was in it, and he said, "Yes, I think we could scare up one around here somewhere." At that, he called the girl and asked her if she could locate one, and presently she arrived with one and we looked it over and discussed the pros and cons for maybe a minute or two. And then, why, I asked him if I might have that copy and he assured me that I could. With that, we parted.

Mr. Holmes: Is that the end of the answer? I would like to have it read back, please.

Trial Examiner Parkes: Please read it back.

(Partial answer read.)

Mr. Holmes: I move to strike that portion, "as much as to say I thought so."

Mr. Bamford: I will join in the motion.

Trial Examiner Parkes: The testimony to the effect, "as much as to say I thought so." may be

(Testimony of Clyde W. Scheuermann.)

stricken. I may not have quoted the exact language, but I think the intent of my ruling is clear.

Mr. Holmes: May I hear the rest of it now? He has read part of it.

(Answer read.)

Mr. Holmes: I move that that portion be stricken as not responsive to the question.

Trial Examiner Parkes: Please read a little bit more in [51] advance of the portion referring to—I mean, where he says something about his being there eight years. I don't know what the testimony indicates, whether it is a statement of someone or——

Mr. Holmes: I thought it was his own statement.

Trial Examiner Parkes: Let us hear it again.

(Answer read.)

Mr. Holmes: I don't think that was intended to be by him as a statement from Mr. Goodenough. Apparently it is something he is interjecting there as an opinion and I don't think it is responsive.

Trial Examiner Parkes: Well, I suggest that the record seems to be clear on its face that that is a part of the conversation with Mr. Goodenough. If you have any doubt, I suggest you clear it up on cross-examination.

Mr. Holmes: Thank you.

Q. (By Mr. Bamford): Now, do you know Les Ollis? A. I do.

Q. In 1949, was he also working for Westinghouse? A. Yes.

(Testimony of Clyde W. Scheuermann.)

Q. Is he working there now? A. No.

Q. Do you know when his employment terminated there? A. Just shortly before mine.

Q. Does Ollis live with you, or rather did he live near you [52] at that time? A. Yes. [53]

* * *

Mr. McGraw: Well, I certainly join Counsel for the company here and I have a few of my own. Certainly this is going still further afield in the testimony about this particular witness and his relationship with the union. It is wholly immaterial and doesn't bear on any of the issues here, and actually goes into matters of union affairs; and if we are going to rebut such evidence, actually it is going to mean that we will probably be here all next week, because certainly it is going far afield from the charges. Now, to draw a conclusion of whatever statements might have been made by this steward to this man Ollis, that the same thing would apply to him, is absolutely ridiculous. In the first place, it wouldn't mean anything even if it happened to this man, let alone somebody not even involved in this particular charge.

Mr. Bamford: If I may be heard for a second, Mr. Examiner?

Trial Examiner Parkes: Yes.

Mr. Bamford: It is a common principle of contract law that where a tender is required, that the requirement of that tender is waived if the tender would in effect be a useless or idle act. I should be glad to cite authorities thereto. Now, presumably

(Testimony of Clyde W. Scheuermann.)
the defense of the company and of the union would be that this witness failed to make a valid tender of proper dues and initiation fees. I shall seek to establish through this witness that such a tender—that a tender was made by another individual, both in his own behalf and on [55] behalf of the witness during this period of time after the union shop election had been held, and that the tender was refused by a designated agent of the union.

Trial Examiner Parkes: Now then, it seems to me that that statement is a little bit different from your statement at the beginning. Was Ollie's tender for himself alone or for himself and this witness?

Mr. Bamford: The tender was for Ollis himself; however, the rejection included not only Ollis but any possible tender on the part of Scheuermann.

Trial Examiner Parkes: Well, I don't care to hear any more argument on the objection, gentlemen. It does seem to me initially that we are going a little bit further afield to bring in Ollis. However, I shall overrule the objection, without passing upon the legal argument and position of the General Counsel in respect to this line of questioning. I think that it is sufficiently material to this case to permit the witness to answer.

Mr. Bamford: Mr. Reporter, do you have the last question marked? If not, I think I know what it is and I can repeat it.

(Question read.)

(Testimony of Clyde W. Scheuermann.)

Mr. Holmes: If he knows.

Trial Examiner Parkes: Yes, if you know. [55]

* * *

Q. (By Mr. Bamford): Do you know if Ollis had been fined and expelled from the I.A.M.?

A. Yes.

* * *

Q. Well, how do you know that Ollis was expelled?

A. I saw the letter, the same as the letter that I got from the union.

Q. And he received a similar letter?

* * *

Q. Was it a letter addressed to Ollis, similar to General Counsel's Exhibit 4, which I will show you?

A. Yes, I believe it is.

Q. And do you know if Mr. Ollis received that letter at or about the same time you received yours?

A. Yes. [56]

* * *

Q. Well, do you know if a union shop election was held covering the unit in which you and Ollis were working in 1949? A. Yes.

Trial Examiner Parkes: Did you vote in the election?

The Witness: No.

Q. (By Mr. Bamford): Were you working on the day the election was held? A. Yes.

Q. Did you see the balloting; did you see the balloting at the election. A. Yes.

(Testimony of Clyde W. Scheuermann.)

Trial Examiner Parkes: Did you know the purpose of the election? [57]

The Witness: Yes.

Mr. Bamford: Well, so that the record may be clear, at this point I think the Board may take official notice of the fact that in Case No. 20-UA-1943 a consent UA election was held August 25, 1949, in which a majority of the eligible voters voted to authorize a union security agreement, and that the certification of results issued following this election on September 7, 1949.

Trial Examiner Parkes: Mr. Witness, did you know the results of the election after it was over?

The Witness: Yes.

Mr. Bamford: I shall repeat my previous question.

Q. (By Mr. Bamford): To your knowledge, on any attempt following the union shop election, did Ollis try to pay dues to the I.A.M.?

A. Yes. [58]

* * *

The Witness: May I answer?

Q. (By Mr. Bamford): Yes.

A. Yes, we were becoming concerned because some of the boys began—some of our better friends were jokingly calling us "free riders" and wanted to know when we were going to pay our dues, and we said "Whenever they take them," and a particular friend of mine told us we'd better get down and see Gorham and see what he was going to do about it. We said, "Don't call us 'free riders.'" And I

(Testimony of Clyde W. Scheuermann.)

asked Les if he had been able to pay dues and he said, no, he had offered them to Elmer Smiley and he wouldn't take them—who was the shop steward in the shop—and then as we walked into the dressing room one evening, we had come in on the swing shift as they were changing clothes and going off of the day shift, and we generally met in the corner—our lockers were there. There was Ollis and myself and Smiley and Nelson and Hank Groth. Hank and Nelson were old friends of mine for a long time, since when we started at Hendy, so we generally joked and passed the time of day. Elmer—I think Elmer started in the plant as my helper. I don't know if he was employed there before that, but it was about the time he came in so we talked rather freely and they said, "When are you 'free riders' going to start paying dues," or words to that effect; and Les is a little bit more sensitive than I [59] am and took it up and said, "How about us, Smiley said how about taking some dues now," and Smiley said the same answer he had given him many times before, "You know I can't take dues from you guys" and so that ended that particular time. [60]

* * *

Q. Now, on any occasion after the union shop election had been held, did you witness an attempt on the part of Les Ollis to pay dues to the I.A.M.?

A. Yes.

Q. Did this occur on more than one occasion to your knowledge? [61] A. Yes.

(Testimony of Clyde W. Scheuermann.)

Q. Did you witness more than one attempt to pay dues? A. No, I only witnessed one.

Q. And when did that attempt take place?

A. In the locker room.

Q. When? A. As we were changing shifts.

Q. When, Mr. Scheuermann, not where—when did this happen?

A. When we were changing shifts.

Q. But, in relation to the year or the month?

A. Oh, very shortly before Les was terminated.

Q. And it took place in the locker room, is that correct? A. Yes.

Q. Who else was present?

A. Hank Groth, Nelson, and Elmer Smiley.

Q. Now, did Elmer Smiley hold an office with the I.A.M.? A. He was a shop steward.

Q. On any occasion have you ever paid dues to Elmer Smiley?

A. Most all of the past year or two.

Q. Now, how did it happen that Ollis attempted to pay his dues to Smiley?

A. There was an incident of kidding about "free riders." It perturbed Ollis and he said, "How about it, Smiley? How about taking some dues now?" Smiley said, "You know I can't take dues from you guys." There was some more bantering and that was the [62] end of it.

Q. And had these fellows accused both you and Ollis of being "free riders?" A. Yes.

* * *

(Testimony of Clyde W. Scheuermann.)

Q. Who was present in the locker room at that time?

A. Hank Groth, Nelson, Les Ollis and myself and Smiley. We were grouped in one corner together, all our lockers were together.

Q. And you said that someone had been kidding you about being "free riders." Who was that?

A. Hank and Nels.

Q. And were they kidding both you and Ollis?

A. Oh, yes. [63]

* * *

Cross-Examination

By Mr. Holmes:

Q. Can you fix the date of that conversation that you say took place in the locker room when Mr. Ollis talked to Mr. Smiley?

A. Not exactly, no.

Q. Can you place it with respect to the date of your termination of employment?

A. Since Mr. Ollis was terminated three weeks prior to my termination, it would be hard to determine—it would be easier for me to determine as to when he was laid off.

Q. You say he was terminated three weeks before you were?

A. Since it was the closer date, yes.

Q. All right. Can you fix it with respect to his termination?

A. I think it would be—they were beginning to

(Testimony of Clyde W. Scheuermann.)

question us about these "free riders" right at the very last few days before he—I would say it was in the last week. I can't place it exactly because they didn't begin that until just the time Mr. Ollis was laid off, and frankly, he was glad to get out of there [66] because of that——

Q. I am not interested in that. Just answer my questions. Was it a week before, or two weeks, or three weeks before he was terminated?

A. Within the last week.

Q. A week. A. A week, yes.

Q. Is that as near as you can fix it?

A. That is as close as I would—would say it was within the last seven days.

Q. The last seven days? A. Yes.

Q. Do you know what day of the week it was?

A. No, I can't remember.

Q. Could you fix it with respect to the union shop election? How soon after the election?

A. The union shop election was held so far previous to that that I——

Q. It was held in August, wasn't it?

A. I don't recall the date.

Q. It was held in August, wasn't it, late in August?

A. I don't know. It is a matter of record, isn't it?

Q. I think it was stated in this record that it was August 25. Is that in accordance with your recollection?

A. I would say that was about right. [67]

(Testimony of Clyde W. Scheuermann.)

Q. Well, now, how long after that or how long before it was this conversation in the locker room?

A. A long while after that.

Q. It was after that? A. Yes.

Q. Can you say how long after, a week or two weeks, or three weeks?

A. Approximately—that is hard to say.

Q. Well, I know you can't give us an exact date, but I want your nearest estimate.

A. It was a long while after because——

Q. Well, how long is a long while, a month, or three weeks?

A. Possibly a month, possibly three weeks, yes.

Q. Three weeks to a month?

A. Three weeks to a month, yes.

Q. Any more than a month?

A. No, I don't hardly think so, because Mr. Ollis was laid off about that time.

Q. And you say it was—then, you would say it was the latter part of September?

A. When I was laid off—November 11th.

Q. This union shop election was August 25th. Now, if this conversation took place about a month later, that would be about the latter part of September. A. It was later than that. [68]

Q. It was later than that?

A. Yes, I am sure.

Q. Was it in September?

A. No, I believe it was considerable later than

(Testimony of Clyde W. Scheuermann.)

September, because it wasn't too far from the time that he was laid off—November, in November it would be two months. It wouldn't have been two months.

Q. Beg pardon?

A. It wouldn't have been two months from the time he was laid off, no.

Q. You were laid off in November?

A. November 11th.

Q. And you would say it was sometime between the last of September and the time Mr. Ollis was laid off, is that right? A. That is right.

Q. He was laid off around what, the middle of November?

A. From three weeks to a month before I was.

Q. From three weeks to a month before you were? A. Yes.

Q. Well, then, a month before you were laid off would have been somewhere around the 11th, between the 11th of October and the 17th or 18th of October, is that right?

A. I would say that would be it.

Q. Would you say that conversation took place between the end of September and the middle of October? [69]

A. The middle of October, yes, I could say that.

Q. Between the last of September and the middle of October? A. That is right.

Q. Now, could we fix it any more exactly than that?

(Testimony of Clyde W. Scheuermann.)

A. No, I couldn't. I couldn't say that we could.

Q. Well, it was within, say, the two-week period, then, between the last of September and the middle of October, two or three week period, is that right?

A. I didn't understand that.

Q. I say, would you place it, then, as nearly as you can, in the two or three week period from the last of September to the middle of October?

A. I would say it was in the later part because——

Q. Later part of what?

A. Of—did you say the middle of October?

Q. Yes, I said from the end of September to the middle of October; now, is that as near as we can fix it?

A. The middle of October is the later date on it. I would say it was closer to the later date.

Q. It was closer to the middle of October?

A. Yes.

Q. Would you say it was in the first week or the second week of October; can you fix it that way?

A. It was just a few days, within three or four days of when Mr. Ollis was laid off, because——[70]

Q. A few days before he was laid off?

A. Just a few days, yes.

* * *

LESLIE E. OLLIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford:

* * *

Q. Did your employment terminate in that year?

A. Yes, it terminated October 17.

Q. 1949? A. 1949.

Q. Now, what was your job immediately prior to your termination? [71]

A. I was a journeyman machinist on assembly, turbine assembly.

Q. What shift did you work?

A. Swing shift.

Q. Did you ride back and forth to work with Clyde Scheuermann at that time? A. Yes.

Q. Were you a close friend of Scheuermann?

A. Yes, I was.

Q. Now, in the Spring of 1949, were you expelled and fined $500 by the I.A.M.?

A. Yes.

* * *

Q. Now, did you hear Clyde Scheuerman testify with respect to an incident of your attempt to pay dues to Smiley?

A. Yes, just a few minutes ago.

Q. Did such an incident take place?

A. It was one of several incidents, yes.

(Testimony of Leslie E. Ollis.)

Q. With respect to this particular incident——

A. Yes.

Q. (Continuing): ——when did that occur, to the best of your [72] knowledge?

A. I have tried to fix the date and I can't exactly, but to the best of my recollection, it was a few days before I was laid off, the occurrence that he is talking about.

Q. Would you say that it occurred within a week prior to your termination?

A. I am quite certain it was in the last week, because it came as a surprise when I got laid off and I thought possibly I might have a case—when I was laid off it came as a surprise and I thought I possibly might have a case similar to this, and I have checked back and remember having offered to pay dues at that—just a few days before and it was during the last week of my employment there.

Q. Now, where did this attempt to pay dues take place?

A. In the locker room that we used there.

Q. And to whom was the attempt made?

A. Well, I offered to pay dues to Smiley at that time and I offered, I believe I phrased it that we were willing to pay dues at any time, or possibly I said I am willing to pay dues, but I recall very definitely Smiley saying, as he had said before, "You know, we don't want any dues from you guys," * * * [73]

Q. Who was present during this conversation?

A. Well, there were quite a few people in there,

(Testimony of Leslie E. Ollis.)

because it was a change of shifts. The ones that I recall definitely were the same ones that Clyde recalled. There was Clyde himself, and Elmer Smiley, and Hank Groth and Nelson, and they—that is, we were grouped together there. There were others scattered around who may have heard it too. [74]

* * *

Q. How did it happen that you made that offer to Smiley, Mr. Ollis?

A. The fellows were kidding us and we had been called "free riders" a few times and I resented that very strongly, as it implies anti-union activity, and I didn't feel at all guilty of that, and seeing Smiley there I thought it would be a good opportunity to clear the air to anyone around there. [75]

* * *

Q. Now, had the accusation of being "free riders" been directed against both you and Scheuermann?

A. Yes. I heard him called that and myself too.

Q. Was Smiley there when these accusations were made on this occasion? A. Yes.

Q. Within earshot? A. Yes.

Q. Prior to this occasion, had you made any attempt to pay dues or get back in standing with the union?

A. Several times, before and since.

Q. Well, before this, however——

A. Before, yes.

(Testimony of Leslie E. Ollis.)

Q. And what was the nature of those attempts?

A. The first attempt was in March. The old contract hadn't expired and I had been expelled and I went to Smiley and offered to pay dues and he told me I would be a damned fool to pay them because I had been expelled. I told him, regardless, that they had the contract then, I wanted to pay dues as long as they [76] had the contract, so he gave me a receipt for the money and said I was still being foolish, but he took them. That was the last time he took dues from me. Later, during the summer, there were three or four occasions when I offered to pay him dues.

Q. And on each of those occasions——

A. On each occasion I was refused.

* * *

Cross-Examination

By Mr. Holmes:

Q. How long have you worked for Westinghouse, Mr. Ollis?

A. About two and a half years, part of it for Hendy.

Q. You worked for Hendy before Westinghouse took over their plant? A. Yes.

Q. Had you been a member of the I.A.M. during that period? A. Yes.

Q. Had you been a member of Lodge 68 before being a member of——

A. Wait. I had been a member of the Aeronau-

(Testimony of Leslie E. Ollis.)

tical and Production Workers here in San Francisco years before. I don't——

Q. I am referring to your employment at the plant at Sunnyvale.

A. Oh, no. At no time there was I a member of Lodge 68. [77]

Q. Were you a member of Lodge 504?

A. 504. (Affirmative nod.)

Q. To whom had you regularly paid dues?

A. I usually paid dues at the office when I attended the union meetings.

Q. At the union office in San Jose?

A. At the union office in San Jose.

Q. Had you paid them in the plant before?

A. Perhaps once or twice, but not, certainly not, very often. In fact, I am not sure but what that one payment to Mr. Smiley in March was the only time. Whether I paid one or two of them——

Q. You say that is probably the only time you paid them?

A. It is possibly the only time. It is probably one or two other times.

Q. Do you know of any other times you paid them in the plant?

A. I don't recall exactly, no.

Q. You paid them to Smiley personally in March, 1949? A. At that time, yes.

Q. Did you get a receipt from him?

A. Yes. [78]

* * *

(Testimony of Leslie E. Ollis.)

Q. What other stewards do you know of that were working there in the building?

A. Only one other, and he was much further away. I can't recall his name right now.

Q. Was it Louis Nunez?

A. Yes. Louis Nunez.

* * *

Q. When would you talk to Nunez?

A. Well, when ever he happened to be passing through. He [80] didn't work near where we worked. Most of the time he was up in the—where they make the turbine blades, around the corner in the building, but he would be passing through occasionally. [81]

* * *

Q. Were you aware that contract negotiations were going on during the late summer?

A. I knew they were going on, yes.

Q. How did you know that?

A. Well, there was talk all over the shop about —rumors, perhaps, but talk about what was going into the contract. [83]

* * *

Q. Where were you called a "free rider"?

A. Where?

Q. Yes.

A. Coming in to work and in the locker room and occasionally on the shift when we were working.

Q. Who called you a "free rider"?

A. Well, I can recall Hank and Nelson, both; they did it in a rather joking manner. I am quite

(Testimony of Leslie E. Ollis.)

sure Smiley did it the same way, and one or two of the other fellows, a crane operator and one or two of the others did it occasionally.

Q. They did it in a joking manner?

A. In a joking manner, yes.

Q. But you didn't take it that way?

A. I didn't take it as a joke, that kind of talk.

Q. Were you rather sensitive about it?

A. If you want to put it that way.

Q. But they appeared to you to be joking, is that right? A. Yes.

Q. All right. When did you first offer to pay dues after April?

A. Well, I certainly didn't offer to pay dues until after the election had been won by the Machinists, and then I offered on two or three occasions to Smiley.

Q. Now, would you fix the time of those, please, how long before your termination? [90]

A. Oh, that would have been, I would say, at least once a month during that—September, October, and probably August.

Q. Before the union shop election you offered to pay dues?

A. Possibly. I don't recall exactly. Until they won the election definitely—I tried to get back in.

Q. It has been stated in this record that the I.A.M. was certified as being eligible to enter a union shop contract on September 7, 1949, the election having been held on August 25th.

A. Yes.

(Testimony of Leslie E. Ollis.)

Q. Now, with respect to those dates, can you state when you first offered to pay dues?

A. No, I couldn't place it too close.

Q. Well, can you say whether it was before or after September 7th, the date when the certification was announced?

A. The certification for what, for the union shop?

Q. Yes.

A. Oh, I don't know. I believe I offered both before and after that, because after they won the election I made it a point to offer, and then a little while later I offered again, and then——

Q. All right. Now, tell me, you say as well as you can remember you did offer to pay dues before they won the election, is that right?

A. No, not before they won the election; before they were certified. [91]

* * *

Trial Examiner Parkes: May we have the date on the representation election?

Mr. McGraw: The certification was issued on July 19, 1949, in Case No. 20-RC-483.

Mr. Bamford: Was that the date of the election?

Mr. McGraw: That is the date of the certification.

Mr. Bamford: When was the election?

Mr. McGraw: It was prior to that. I don't remember.

(Testimony of Leslie E. Ollis.)

Mr. Bamford: My records show June 13, 1949, as the date of the certification election.

Mr. Holmes: The certification, I think, was July 18th, somewhere along in there.

Mr. Bamford: I am sorry, I take it back. The direction issued June 13th and the elections were held July 7, 1949.

Mr. McGraw: That is correct.

Mr. Bamford: Board's Supplemental Decision and Certification of Representatives issued July 19, 1949.

Mr. McGraw: That is correct.

Mr. Bamford: So that in answer to the Examiner's question, the representation election was held July 7, 1949. [92]

Trial Examiner Parkes: All right. Then you had the union shop election on August 25, 1949?

Mr. McGraw: That is correct.

Mr. Bamford: Yes, sir.

* * *

Q. (By Mr. Holmes): I want to get the time as near as possible, Mr. Ollis, when you first made your offer of dues.

A. I believe you have that time now.

Q. That was after the union shop election?

Mr. Bamford: Just a moment. That isn't what the witness testified to.

Q. (By Mr. Holmes): Was it before or after the union shop election; can you answer that?

A. I think it was both before and after the

(Testimony of Leslie E. Ollis.)

union shop election, but definitely after they won the representation, yes.

Q. Now, why did you offer dues after the representation election and before the union shop election?

A. Well, I offered dues at all times in order to get back into the union, every time that I offered them.

Q. That was the reason you offered them?

A. That was the reason I offered them. As short as a month ago I tried it.

Q. You offered the dues, then, sometime between July 18 and August 25, the first time? [93]

A. I would say yes.

Q. And you offered them a second time—strike that, please.

To whom did you offer them on that occasion?

A. Smiley.

Q. Smiley; where?

A. I believe where he works, I offered him dues a couple of times, anyway.

Q. All right. Then you offered them again after the I.A.M. had won its union shop election, is that right? A. Yes, certainly.

Q. How soon after, do you know?

A. No, I don't.

Q. Whom did you offer them to?

A. Smiley.

Q. Where? A. Where he works.

Q. And did you offer Mr. Smiley dues again——

A. Yes, just before I was laid off.

(Testimony of Leslie E. Ollis.)

Q. On those first two occasions, were you alone when you did it?

A. I believe I was alone every time; when I was coming in to work and passing where he was working, I just walked over and talked to him.

Q. On those two occasion that you have related when you offered dues to Smiley, were you alone? [94] A. Yes, I believe I was.

Q. And you say you offered dues to Mr. Smiley again shortly before you were terminated?

A. That is right.

Q. How long before?

A. Not over a week; probably only two or three days. It was just shortly before.

* * *

Q. Why did you offer your dues to Mr. Smiley on this third occasion, because you were called a "free rider"?

A. Well, I offered dues to Smiley to get back in the union. After I had been turned down a couple of times it became pretty obvious what the answer would be, as I said before, and being [95] called a "free rider" was the immediate occasion that made me offer them again.

Q. You were offering those dues in order to demonstrate something to those people who were calling you a "free rider"?

A. Either that, or have the dues accepted and get back in the union.

Q. I want to know which.

(Testimony of Leslie E. Ollis.)

A. I thought he would probably turn them down as he had before; if he didn't, so much the better.

Q. As a matter of fact, you were offering them just to clear the air, as you put it, weren't you?

A. Not exactly. I would have been very glad if he would have accepted them, any of the times.

Q. Did you offer your initiation fee also?

A. I don't know whether I did. I didn't on the last occasion, I don't believe, but I had offered the initiation dues on one of the other occasions when I told him I wouldn't pay any of the fine.

Q. When did you offer him your initiation fee?

A. On one of the other two or three occasions, whenever I offered him dues because I remember telling him, I wanted it to get back to Gorham that I wasn't going to pay any of the fine.

Q. I believe you testified you offered him dues on three occasions only? [96]

A. Well, I never said only, but I remember there were at least three occasions there, possibly more.

Q. Well, now, when did you offer initiation fees, on which occasion—the first one?

A. I am not sure which occasion.

Q. You don't know when you did it?

A. No.

Q. You didn't offer it the last time, though?

A. No, I don't believe I did.

Q. Did you have the money in your hand on the third occasion, in the locker room?

A. In my pocket.

(Testimony of Leslie E. Ollis.)

Q. You didn't have the money in your hand and offer it to him? A. No.

Q. What did you say to him?

A. I said, "Smiley, you know we are ready to pay dues any time you want," or words similar to that.

Q. Didn't you say a moment ago you didn't know whether you said "we" or "I"?

A. I still don't know. We were both standing there.

Q. You don't know whether you said "we" or "I"? A. No, I don't.

Q. You said either "we" or "I" was ready to pay dues? A. That is right. [97]

Q. But you didn't offer him the money?

A. I wouldn't have had a chance, unless I had been awfully quick on the draw.

Q. You didn't have the money in your hand when you talked to Smiley?

A. No, I didn't have the money in my hand.

Q. Who else was present?

A. Clyde Scheuermann, Hank Groth, Nelson and Smiley, that I know of, and there were several others.

* * *

Q. What did Mr. Scheuermann say during this conversation—anything?

A. Oh, I don't know. He probably said something, but I don't — I remember what I said to Smiley and who the witnesses were. Those were

(Testimony of Leslie E. Ollis.)

the only things that stuck in my mind as being important.

Q. You don't remember Mr. Scheuermann saying anything at all, [98] then, is that right?

A. He probably said something.

Q. But you don't remember what he said?

A. I don't recall what he said, if he said anything, no.

Q. What had Mr. Smiley told you on the first two occasions that you talked about, when you offered dues?

A. Almost identically the same, I believe.

Q. What did he say?

A. "We don't want any dues from you fellows." It was always the same answer. A group of—Clyde and I together were the only two that had been expelled from the Machinists' section. We were always grouped together in the fights.

* * *

Q. Did you see Mr. Nunez during the last week when you were there at the plant?

A. I don't know. I don't recall whether I did or not. I don't remember talking to him.

Q. You don't remember talking to him?

A. No, I don't.

Q. Do you know a Mr. Klein? [99]

A. What is his first name?

Q. Kenneth Klein?

(Testimony of Leslie E. Ollis.)

A. No, I might know his face, but I don't recall the name.

Q. Do you know a Mr. Emil Tonascia?

A. Yes.

Q. Did he work there with you? A. Yes.

Q. Do you remember having any conversations with him about the contract negotiations or the signing of a contract?

A. No, I don't. He was a leaderman, and not my leaderman. I had very little occasion to talk with him, really.

Q. You don't recall——

A. I don't recall him, no.

Q. Do you know a Mr. William Ostrom?

A. Bill Ostrom—Bill, that is his first name—yes, I imagine I do. It sounds awful familiar, but I can't place where he worked or what he looks like right now.

Q. You don't remember any conversations with him, then, during the last month you were there at the plant? A. No, I am not sure.

Q. Do you know a Mr. Liebenthal?

A. Yes.

Q. Do you remember having any conversations with him during the last month you worked at the plant?

A. Well, we used to drink coffee together and stuff, once in a [100] while, and we talked a lot about all kinds of things.

Q. Do you recall talking to him about the contract negotiations?

(Testimony of Leslie E. Ollis.)

A. Oh, it is quite likely that we did talk something about it—but I wouldn't—I don't recall what the conversation was, or anything.

Q. Do you remember any conversation with him about the union shop contract or the fact that a contract had been signed? A. I——

Mr. Bamford: Just a minute. I would like to again object to this line of questioning, and if it is overruled, I would like a standing objection to this line. I think it is departing materially from the scope of the direct examination.

Trial Examiner Parkes: Objection overruled. You may have a standing objection to the line.

Q. (By Mr. Holmes): Who was your leaderman? A. Who was what? Judd was.

Q. Frank Judd?

A. Yes, but later—I can't think of his name right now—Roy Weirhauser.

Q. W-e-i-r-h-a-u-s-e-r? A. I presume.

Q. He was your leaderman at the time you were terminated? A. That is right.

Q. Did you have any conversations with him about the union [101] shop contract in the plant?

A. About the union shop contract?

Q. About a union shop contract in the plant?

A. No, not in the sense that you mean it.

Q. Well, in what sense did you talk to him about such a contract?

A. Well, there used to be a contract there when I first worked there, and up until March, and I don't doubt I talked with him about that contract.

(Testimony of Leslie E. Ollis.)

Q. I am referring to, say, the month before you were terminated?

A. I didn't know there was a contract, and I didn't have any conversation with him about the contract being signed, because I didn't know it was signed.

Q. You knew a contract was being negotiated?

A. Yes.

Q. Did you ever talk to Mr. Weirhauser about the negotiations?

A. Well, I imagine I did on a few occasions, about the negotiations, wondering what kind of raise we would get, and stuff like that.

Q. Did you say Judd had been your leaderman?

A. Yes.

Q. Up until what time?

A. I don't recall the date. It would be just a wild guess if I attempted it. [102]

Q. Did you have the same leaderman as Mr. Scheuermann just before your termination?

A. Yes, just before I terminated. I didn't earlier.

Q. How long had you been in the same gang?

A. It hadn't been long, because he came back—he had been on a leave of absence and he came back to work and he was transferred to our gang then. I would say maybe, oh, a couple of months would be my guess, before I was laid off.

Q. Was Mr. William Reynolds in that gang?

A. Not that I know of. The name isn't familiar.

Q. Can you tell me who else was in that gang?

(Testimony of Leslie E. Ollis.)

A. I can tell you probably the names of the ones I worked with.

Q. Could you give us the names?

A. I have a very poor memory for names.

Q. Were any of these people that I have asked you about working with you—Klein or Tonascia?

A. No, they were in different gangs.

Q. Ostrom? A. No.

Q. Liebenthal? A. No.

Q. Or Reynolds? A. No.

Q. Did you ever work with a man named Fred Kearns? [103] A. Yes.

Q. How about Frank Sommerfield?

A. Well, I was in a different gang from him, but I saw quite a bit of him.

Q. Horace Anderson?

A. Yes, he was under the same leaderman.

Q. You worked with those people, then, part of the time?

A. Some of those people I worked with and talked with quite a few of them.

Q. Do you remember anybody else you worked with?

A. Oh, a fellow named Fellman, who quit there several months before I was laid off, and Al Granger, who quit a few days, I believe, before I was laid off.

Q. Any others that you can recall?

A. There was a boy, Paul Barnes, I talked with him.

Q. Barnes?

(Testimony of Leslie E. Ollis.)

A. Yes. That is about all. Usually I just worked with one other fellow, small gangs.

Q. Before you were terminated, did you ever go to see Mr. Gorham? A. Go to see him?

Q. Yes, between July 19th and the time you were terminated, did you ever go to Mr. Gorham's office to see him?

A. No, nor did he ever come to see me.

I don't suppose we had anything to talk about. [104]

Q. Did you ever talk to any other union official or officer or agent?

A. I talked to Babcock once during that period.

Q. When did you talk to him?

A. Well, that was fairly early, that was back in—I guess in March.

Q. Now, confining yourself to the period from July 19th until you were terminated, did you ever talk to any union officer or business agent?

A. No. I talked with Nunez once in a while, but Smiley was the only one really close.

Q. Nunez and Smiley, then, the stewards, were the only ones you talked to so far as you know that had any authority in the union?

A. Yes. [105]

* * *

CLYDE W. SCHEUERMANN

a witness called by and on behalf of the General Counsel, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Holmes:

Q. Mr. Scheuermann, I understand that [113] you worked at the Westinghouse Plant, or for the predecessor at that plant since 1941, is that correct?

A. That is correct.

Q. For how long had there been a union shop or a closed shop contract at that plant?

A. Will you repeat that? A union shop or closed——

Q. A union shop or a closed shop contract?

A. I wouldn't know. I don't know whether we had a closed shop contract before or not, I am not sure.

Q. Do you know whether you had to belong to a union to work there? A. I knew that, yes.

Q. How long had that condition been true?

A. I understood it to be true from the time I went to work there.

Q. From 1941 on? A. 1941 on.

Q. You were aware of that? A. Yes.

Q. How did you learn it, when you went to work there?

A. I was approached by a shop steward and asked to join.

Q. And that is how you learned of it?

A. Yes.

(Testimony of Clyde W. Scheuermann.)

Q. Then you just continued to pay your dues and asked no questions about it after that?

A. That is right. I was initiated. [114]

* * *

Q. And you continued to be a member of the union up until the Spring of 1949?

A. That is right.

Q. Where did you pay your dues?

A. I used to pay them in the shop.

Q. You paid them in the shop? A. Yes.

Q. Whom did you pay them to?

A. It was customary to pay them to Elmer Smiley in the last year.

Q. In the last year? A. Yes. [116]

* * *

Q. Now, about that time, that is, the time these letters were written—March of last year—you became active on behalf of another labor organization, didn't you? A. That is right.

Q. As a matter of fact, you became President of an organization, didn't you? A. Yes.

Q. Had you been a union officer before?

A. No. [120]

* * *

Q. As President of this organization which was established [121] in the Spring of 1949 you had certain duties, didn't you? A. I did.

Q. You conducted meetings? A. I did.

Q. You had a union constitution and bylaws drafted, and that sort of thing, didn't you?

A. That's right.

(Testimony of Clyde W. Scheuermann.)

Q. You conducted an organizing campaign, did you not? A. I did.

Q. You conducted a campaign for the purpose of having that organization elected as the representative of the workers in the plant, didn't you?

A. That's right.

Q. You took a leave of absence to conduct those affairs, didn't you?

A. The first thought of taking a leave of absence was not for that purpose. It later developed that was what happened, yes.

Q. You say you didn't take the leave for that purpose?

A. No, sir. I took two weeks' vacation and then requested a leave because the boys had asked me to—they thought I could do more for them on the outside than I could on the inside, and my desire to leave the shop was because it was becoming untenable to work without causing a slow-down of the work, and I was more afraid of getting some of my friends put on the spot [122] because they naturally stopped their work and talked to me, and it made it rather difficult.

Q. Well, there had been some campaign, some organizing carried on by yourself, as a matter of fact, before you went on a leave of absence, isn't that right? A. Naturally that happened.

Q. For about how long did you act as President of this union? A. Through its duration.

(Testimony of Clyde W. Scheuermann.)

Q. Well, what was that—three or four months, of five months? A. I haven't those dates.

Q. Well, the election was—the result of the election was announced in, I think—or, on the 19th of July, I think. That date has been identified in this record.

Your organization was established in March, in February or March, wasn't it?

A. Just prior to——

Q. About the time of the representation hearing, wasn't it? A. Yes.

Q. In February, then? A. Yes.

Q. You were actice then as President of this union from February to July, weren't you?

A. That's right. [123]

Q. You were carrying on these various activities that you have spoken of, directing the organizing, and the campaign for the election and all that sort of thing, isn't that right? A. That's right.

Q. And you had something to do with the drafting of the constitution and bylaws of that organization, didn't you? A. Yes.

Q. And you conducted meetings? A. Yes.

Q. Did you appoint committees to carry on various activities?

A. Yes—I didn't appoint any committees, no.

Q. Well, did you direct the activities of organizers?

A. Our Executive Board handled the part of the committees, committee for a dance and so forth.

(Testimony of Clyde W. Scheuermann.)

Q. Well, you were a member of the Board, weren't you? A. Yes, I was.

Q. As a matter of fact, you acted as chairman of the Board? A. Whenever I was present.

Q. Whenever you were present? A. Yes.

Q. That was part of your job as President of this organization? A. That's right.

Q. Your organization, in its Board meetings, or in its membership meetings—did it ever get to the point that you [124] drafted the contract proposals or considered what you would propose to the company if you were elected as the representative?

A. They began having discussions, yes. They never got beyond the discussions.

Q. But you did discuss the possibility of a contract proposal? A. Yes.

Q. And among other things you discussed the possibility of asking for a union shop, didn't you?

A. I don't recall that that came up, no.

Q. Did you discuss the possibility of requiring union membership as the other contracts had required in the plant?

A. No, I don't recall—no, nothing to that effect.

Q. You don't recall that in your discussions?

A. That's right.

Q. Did you have other contracts there that you considered in these discussions to guide you in the proposals that you might request or demand?

A. The committee elected to appoint—I wasn't a part of that committee and never met with them,

(Testimony of Clyde W. Scheuermann.)

but they were trying to gather some data on contracts. I know that.

Q. I see. And they had the National I.B.E.W. contract with the Westinghouse organization, didn't they?

A. I don't recall actually seeing any of the contracts. [125] I know they requested that I locate some and at the time the election came up, why, we really hadn't gotten into it. I know I hadn't turned over anything to them.

Q. Had you gotten any contracts together?

A. None that I saw. Now, they possibly had some.

Q. Did you ever get the National contract that U.E. has with Westinghouse, among others?

A. Now, that is one they requested me to get, but I hadn't—the election came up too soon and I hadn't even been able to acquire that.

Q. After the representation election, when did you go back to work?

A. The election was the 7th—what day was that? Was that a Friday? What day was the election? What was the 7th? Anybody have a calendar?

Q. The 7th of July was the date of the election?

A. Yes. I believe the closest Monday.

Q. Somebody is trying to produce a calendar. Just a minute.

Mr. Bamford: The 7th was a Thursday.

The Witness: Then I returned to work on Monday, the following Monday.

Q. (By Mr. Holmes): You returned the fol-

(Testimony of Clyde W. Scheuermann.)

lowing Monday, is that right? A. Yes.

Q. Did your organization disband then?

A. Yes. [126]

* * *

Q. Did you ever call up Mr. Gorham and ask him about it? A. No.

Q. Did you ever call up Mr. Scott? A. No.

Q. Did you ever talk to any supervisor about it?

A. No.

Q. Did you ever make any attempt at all to find out about it? A. No.

Trial Examiner Parkes: Did you ever see a copy of the contract posted on the Bulletin Board?

The Witness: No.

Q. (By Mr. Holmes): Did you ever see a contract posted on the Bulletin Board all the time you were at the plant?

A. I think we had at times, yes.

Q. When—before Westinghouse took over?

A. Possibly, yes. I know we had quite a number of items posted from time to time, but they never had a very good posting system there and the company directives—I can remember the Fair Wage Act being posted on the wall. That was one in particular.

Q. Do you mean the Fair Labor Standards Act?

A. Yes.

Q. That was posted years before wasn't it?

A. That is right.

Q. Did you ever see a contract posted on the

(Testimony of Clyde W. Scheuermann.)

Bulletin Board [151] while Westinghouse had the plant? A. Not that I recall, no.

* * *

Q. While you were at this plant did you ever know of any individual who had been discharged for failure to pay union dues?

A. No, I don't think I did.

Q. I understood you to testify the other day that on the 11th of November you received a telephone call, was it, or just a notice from somebody to go to Mr. McAuliffe's office?

A. As I walked in the plant between 4:00 and 4:30, I was met in the aisle by the day foreman.

Q. Who was that? A. Semondi.

Q. What did he tell you?

A. He said, "Mr. McAuliffe wants to see you in the office," and with that he led the way to the office.

Q. Did he stay there? A. No.

Q. Mr. McAuliffe was there alone? [152]

A. Yes, alone.

Q. Was his stenographer there?

A. Yes, she was in the adjoining—I don't know, an adjoining room there.

Q. Was this about 4:30? A. Yes.

Q. What did Mr. McAuliffe say when you came in?

A. He offered me a chair, said, "Clyde, I have a letter here from the union. I will read it to you and then I will let you read it," and he read it to me; then he handed it to me and I read it. And I

(Testimony of Clyde W. Scheuermann.)

waited for a second or so, then he said, "I have the then he handed it to me and I read it. And I agreement here, that section that it refers to." He said, "I will read that to you and let you read it," so he read the agreement.

Q. Didn't you ask him for a copy of it, of the letter?

A. Not at that time. That was an after thought.

Q. After a few minutes?

A. No, after we'd parted, why I went in to get my termination slip with the girl and as I walked out, he was coming back in again and I asked him if I might have a copy of it.

Q. What did he tell you?

A. He said, "Well, this is the only one I have. I don't like to give it up, but you can sit down an take notes of it." He gave me his pen and sat me down at a table with the letter to take notes of it. [153]

Q. Had his stenographer gone at that time?

A. I don't know if she was there or not.

Q. He told you you could make notes of it?

A. Yes.

Q. And did you?

A. Yes, I believe I copied it.

Q. You copied the whole thing?

A. Word for word. It was a short letter.

Q. After you looked at this agreement—you did look at the agreement when he handed it to you?

A. Yes.

(Testimony of Clyde W. Scheuermann.)

Q. What did you say?

A. I said, "Yes, but I don't think this applies to me."

Q. Why did you say that?

A. Well, I said, "Because I feel mine is a special case."

Q. Well, had you offered the union your initiation fees and dues? A. No, I had not.

Q. Did you tell him why you thought yours was a special case?

A. Yes, I did. I said, "You know of the election and the fact that I was fined and expelled," so I felt I had no way of being able to comply with it.

Q. What did he say?

A. He said, "You are referring to this thing here, aren't you?" He pointed it out, and I said, "I think so." I couldn't see it [154] across the table, and I took it from him again and reread it and I said, "Yes, that is what I base my assertion on, equal rights."

Q. Equal rights? What did you mean by that?

A. Well, that part of that that says everyone shall have an equal chance to comply.

Q. The same opportunity?

A. That's right, without discrimination. Well, I don't know if it says reasons, for other reasons, for non-payment of dues, or what.

Q. It said something about the same opportunity to join the union as everybody else, or words to that effect? A. That's right.

Q. Something like that? A. Yes.

(Testimony of Clyde W. Scheuermann.)

Q. What did he say?

A. He said, "I don't think they can make it stick, do you?" I said, "No."

Q. He said that?

A. He said that, yes. And I said, "No, I don't."

Q. Then what happened?

A. Then there wasn't anything said for a minute, and then I said, "There wasn't anything wrong with my work, was there," or if he had any report about me causing any trouble or fellows not cooperating with me in any way, and he said, "No, Clyde, [155] you are a good man." I think he repeated that about five times. I don't know whether he was trying to make me feel good or whether he really meant it. So after that we sat quietly for awhile and I said, "Well, what do you want me to do?" He said, "Well, all I can do is ask you to check out." So he asked me if I would try to that night. I said, "Yes." When I got up to leave, I said, "This thing smells to me." I said, "I hope," I said, "I have a good opinion of you. I hope you had no part in it." He just smiled at me and that was the end of our conversation.

Q. Except that you came back to make a copy of the letter, is that right? A. Yes. [156]

* * *

Q. Then you went to the plant again?

A. Yes. I seen Mr. Cassady. Edises was back in the Supreme Court at the time. I couldn't get in touch with him, so I went to find out what the law

(Testimony of Clyde W. Scheuermann.)

said, get a copy of it, and find out just where I stood in the matter, and the only place I could think of to go was there, so I discussed it with him. He told me—I told him what I knew of the facts of it, and he said, "It appears to me that there must be some misunderstanding." I believe he said, "Why don't you go back and talk to Mr. [157] Goodenough and see if there hasn't been something overlooked."

Q. Didn't he tell you to see Mr. Gorham?

A. No. I said, "Do you suppose it would do any good if I go to see Mr. Gorham and offer to pay? If that is what I am supposed to do, that is what I want."

He said, "Yes, that will be all right."

And so I said, "I suppose I should go and see Mr. Gorham first and then go to the company," and he said, "Yes, I think that is wise."

As I left, why, he said, "If you want, you can tell him that you talked to me and I suggested this to you, to try and——"

Q. All right. Then you went back to the plant next, didn't you?

A. I think I went to see Scott first.

* * *

Q. Now, when you came back to Westinghouse you saw Mr. Goodenough the first time, didn't you?

A. Yes. [158]

* * *

(Testimony of Clyde W. Scheuermann.)

Q. Did you tell him you had been to see Mr. Scott? A. Yes.

Q. What else did you tell him?

A. I told him I had an appointment with Gorham for the next day, that I couldn't mistake because he asked me if I would mind returning the next day and let him know what Frank said.

Q. Frank Gorham, you mean?

A. That's right.

Q. All right. What else did you tell Mr. Goodenough?

A. We talked about the same thing that I talked to Mr. McAuliffe about. I asked him if he had had any word about my work, that it wasn't satisfactory, and he assured me that it must have been because they didn't have a habit of keeping people that didn't——

Q. Did you tell Mr. Goodenough that you had been expelled from the I.A.M. and had been fined?

A. Yes.

Q. In this conversation you told him that?

A. Yes. It was either that one or the second conversation.

Q. One or the other?

A. One or the other, yes. [159]

* * *

Q. And are you referring now to General Counsel's Exhibit No. 4? (Handing document to witness.) A. Yes.

Q. Isn't it a fact that you received an earlier notice telling you of the Lodge's action?

(Testimony of Clyde W. Scheuermann.)

A. I had a notification of the trial. I don't recall that I had another letter.

Mr. McGraw: I would like to ask if I can refresh this witness' memory, if you please.

Would you care to see it first?

Trial Examiner Parkes: No. Go ahead.

Q. (By Mr. McGraw): I show you what purports to be a copy of a letter sent to you, Mr. Scheuermann, and ask you if that would refresh your memory?

A. Yes, I recall that I did receive it.

Q. You received such a letter?

A. Yes, I recall it.

Q. And the date of this letter appears to be March the 22nd. Would you say you received that within a few days after that?

A. Yes, I recall more now since I read the last line, where it was being submitted, and I didn't take much cognizance of it until the final O.K. came from the International.

Q. Now, after you had received notice of the Lodge's action [167] did you file any appeal with the Lodge or with the International? A. No.

Mr. Bamford: Objection, irrelevancy.

Mr. McGraw: I suppose you are waiting for me?

Trial Examiner Parkes: No. I assume that the question relates to the contents of that letter, does it not, an appeal being filed from the action of the Local? I haven't seen the copy of the letter.

Mr. McGraw: Oh, I am sorry.

(Handing document to Trial Examiner.)

(Testimony of Clyde W. Scheuermann.)

Trial Examiner Parkes: The objection is overruled.

Mr. McGraw: And did you answer that question?

Mr. Bamford: Yes, he answered the question.

Q. (By Mr. McGraw): And in fact, Mr. Witness, you did nothing concerning your trial and expulsion until you were removed from the job at Westinghouse?

A. The only thing I did was continue to pay dues, as I always had.

Q. And how long did you continue to pay those dues?

A. I continued until they were—well, there were three months' returned to me.

Q. Well, isn't it a fact that you were always on the verge of being dropped for non-payment of dues? A. No.

Mr. Bamford: Just a minute, just a minute. I am once again [168] going to object to the relevancy of this line of questioning. Perhaps I should have made it clear, I didn't object earlier to this line because I thought it bore upon the witness' credibility. Since the witness has admitted he had received this letter which has been shown to him, it seems to me the issue stops there, once he admitted the fact that he was expelled from the union.

It seems to me anything further is irrelevant.

Mr. McGraw: Well, Mr. Trial Examiner, I objected, of course, to quite a few things that have already been admitted. I thought they were irrel-

(Testimony of Clyde W. Scheuermann.)

evant and immaterial. However, since they were admitted, I think very definitely some issues are posed here which go to the very crux of this entire matter.

Trial Examiner Parkes: Well, gentlemen, I don't see that the fact that he may have had a little difficulty in paying dues or being in arrears in dues at times has any bearing on the matter now, just as I see no reason for us to go into the reason that he was expelled from the union. We can assume that—Let us assume that he has violated the constitution of the union, possibly, he had or hadn't. I don't know. That really doesn't concern us, the reason for his expulsion.

I think counsel for the Board has made a point, that as far as the Act is concerned the Act talks in terms of being expelled from membership or being deprived of membership. We have had some testimony on the reasons and the background for [169] his expulsion.

However, I don't think those reasons are material herein and I shall sustain the objection.

Mr. McGraw: Well, perhaps I don't understand the full implication of your ruling, Mr. Trial Examiner. General Counsel elected, I think, to show that he was expelled because of a grudge and that it was useless for him to apply for readmission.

I think if there is any further merit to those contentions at all here, that certainly the demonstration of his failure to comply with our laws and his failure to exercise the privileges and the opportuni-

(Testimony of Clyde W. Scheuermann.)

ties afforded by those laws certainly makes him partly responsible for the predicament that he finds himself in now.

Trial Examiner Parkes: Well, let me ask counsel in that regard, are you relying upon his history of leadership in the opposing union and the fact that led to his expulsion as part of your grounds of argument, that it was useless for him to attempt to seek membership in the union after the contract was negotiated?

Mr. McGraw: We don't say that it was useless for him to apply. We won't admit that.

Trial Examiner Parkes: I am asking the General Counsel.

Mr. McGraw: Oh, I am sorry.

Trial Examiner Parkes: If that is his [170] position.

Mr. Bamford: Well, it is one of several positions taken, one of several alternative positions taken by the General Counsel. My objection to the last question that was asked by Respondent Union's Counsel was that matters relating to tardiness in paying dues prior to the time of his expulsion would be irrelevant here, in view of the fact that he was fined $500 and expelled from the union—whether the fine of $500 had been placed for non-payment of dues or whether it had been placed for dual unionism is probably irrelevant, if, in fact, after the fine had been placed upon the individual, that it was then made clear to him by the union that he could not be reinstated into the union or pay dues or pay

(Testimony of Clyde W. Scheuermann.)

initiation fees or in any way have anything to do with the union until the fine had been paid.

Now, I think, simply for the purposes of background, that it is interesting to the Board and to the Trial Examiner to know why he was expelled, which was for dual unionism rather than for tardy payment of dues, but it seems to me the crucial issue here is the fine, and what the fine was levied for is probably irrelevant, but attempts to go beyond the fine, go back of the fine, it seems to me, are certainly irrelevant.

Trial Examiner Parkes: Well, I just wanted your position. If you are going to rely upon any of the background material, then I certainly don't want to foreclose counsel from going into his side of the story. [171]

However, it was my impression that your theory was that he was expelled——

Mr. Bamford: And fined.

Trial Examiner Parkes: And fined, then. The reasons for it are of no particular concern to us.

Mr. Bamford: Yes, that is correct.

Trial Examiner Parkes: Again, as I say, the only conceivable reason you might rely upon it would be as an excuse for his failure to seek membership in the union after the union shop contract was negotiated, and on that I wanted to be clear.

Mr. Bamford: No, I am suggesting that with respect to any possible duty he might have had to tender dues and initiation fees, that the union by its conduct had made it clear to him and to Ollis

(Testimony of Clyde W. Scheuermann.)

that such a tender would be a useless or idle act, and that was certainly corroborated, I think, by the witness' testimony when he went to see Gorham and went to see Scott, the head business agent.

Trial Examiner Parkes: So that I may be clear on your position, you are relying upon events subsequent to the expulsion and fine?

Mr. Bamford: That is correct.

Trial Examiner Parkes: By the union?

Mr. Bamford: Yes.

Mr. Holmes: You are relying on events subsequent to his termination, then, is that it, if I understand your statement [172] correctly; is that right?

Mr. Bamford: Well, I don't think it is your place to ask me any questions.

Trial Examiner Parkes: I was directing attention back to the time of the fine.

Mr. Holmes: I shall ask the question of the Trial Examiner, then, if he would care to ask it of you. It seems to me I objected to a lot of this material on the General Counsel's direct case because it seemed remote in time and irrelevant and immaterial for that reason.

Now, you are questioning him concerning that, I suppose, to try to determine the relevancy of material that has already gone in?

Trial Examiner Parkes: Well, my purpose is—I want to determine the issues as narrow as possible. There are some legal problems involved on which undoubtedly he will argue one point and you will argue another. I am assuming that in advance here

(Testimony of Clyde W. Scheuermann.)

—One can readily see that from the facts of the situation here—and your question was whether he was relying upon events occurring subsequent to the termination. I assume Mr. Scheuermann's call on the union——

Mr. Holmes: On Gorham and Scott, that Mr. Bamford referred to.

Trial Examiner Parkes: I assume that he is relying upon them, but as to the legal conclusions that may be drawn from [173] those events, that is another question.

Well, in view of our questions and answers and statements of position taken, suppose we continue with the examination and you pose another question here. I think we have lost sight of the original question.

Q. (By Mr. McGraw): Mr. Scheuermann, when was the first time after you were expelled that you made application to Lodge 504 for reinstatement?

A. That was on the Monday following—Friday, I was discharged on Friday. It was the following Monday, or the following Tuesday. I don't know if there was a day skipped or not.

Q. That was the first time you contacted members of the union with regard to reinstatement?

A. That's right.

Q. And I believe you testified you contacted Mr. Scott? A. First, yes.

Q. What time of the day was that?

A. It was in the afternoon of Monday.

(Testimony of Clyde W. Scheuermann.)

Q. And approximately what time?

A. I don't recall the time. I don't recall the exact time, it was in the afternoon.

Q. Did you have to wait to see Mr. Scott?

A. Well, I asked the girl at the desk for an application blank first, and it took a little while to fill them out, and she stapled them and then she went to the files and found out what the case [174] was, and she went to Mr. Scott.

Q. And that was an application for membership?

A. Yes. I requested—as near as I know, I told her I worked at Westinghouse and wanted the application for union membership there, and whatever she gave me—I didn't read the heading of it. I don't know whether it was an application to rejoin or an application for union shop, because I didn't read the heading of it.

Q. And I believed you already testified that she tore that up later on?

A. Yes, she just wadded them up and threw them in the waste paper basket and sent me in to Mr. Scott.

Q. Tell us again, if you please, just what you said to Mr. Scott and what he said to you.

A. All right. I told him I was out to try to straighten out, see what we could do about my being laid off at Westinghouse, and he said, "Well, yes, Clyde—" said this in a very friendly manner. He said, "Yes, Clyde, I think we can do something. You pay your back dues and your new initi-

(Testimony of Clyde W. Scheuermann.)

ation fee and the $500 fine—" he added that, and I kind of smiled at that, and I said, "Oh, yeah?"

I didn't even express it beyond that point and he said, "Well, I will tell you, Clyde, I don't know anything about the case. I haven't been following it. Frank has been handling that." [175]

And he said, "I will make an appointment with him," and I said, "Well, all right." And I said "Whatever time you say will be all right," so he made it for ten o'clock the next morning. [176]

* * *

Q. You knew for a fact, didn't you, that you were required to submit any fine along with the reinstatement fee before the Lodge could reconsider your application?

A. No. No, I merely thought that I could have complied under the law as it stands. At that time I didn't even know you had to submit a new initiation fee.

* * *

Q. Now, I believe you came back and you saw Mr. Gorham the next day? A. That's right.

Q. What time of day did you see him?

A. Ten o'clock in the morning, I think, was the time for the appointment—rather close.

Q. What did you say and what did he say?

A. He came out to the desk to meet me and I said, "Frank, I came to see you about an application or doing whatever I have to do to join—fix me up at Westinghouse."

(Testimony of Clyde W. Scheuermann.)

He said, "Clyde, you haven't even got a job."

He said, "I can't do that, you haven't got a job."

Well, that showed me right then there was no use, there couldn't be any negotiation or anything. I said, "Is that your answer?"

He said, "Yes," and so I walked out; that is all. [177]

Q. Now, after the conversation with Mr. Scott and Mr. Gorham that you have just related, did you appeal to the Grand Lodge of the International Association of Machinists on the basis that you were being discriminated against? A. No.

Mr. Bamford: Objection, irrelevancy.

Trial Examiner Parkes: Well, I take it you are relying upon his visits to the offices of the Local Union after his discharge, since you adduced that testimony from the witness.

I believe he has already answered. The answer may stand.

Q. (By Mr. McGraw): Did you ever write to the Lodge or direct any communications through the Lodge asking them to consider your particular case in view of the fact that you had been, shall we say, discouraged by Mr. Scott and Mr. Gorham?

A. No.

Q. Now, from the time that the union shop election was conducted until the time of your discharge, did you visit the union office and offer to pay your dues? A. No.

Q. And the only offer in that respect that you have any knowledge of is this particular occasion

(Testimony of Clyde W. Scheuermann.)

in the locker room in which some kind of an offer was made to Smiley, is that correct?

A. That's right.

Q. And did you offer Smiley any particular amount of money on that occasion? [178]

A. No, I did not. He had refused me before and I felt that if Les could pay his, then certainly he would take mine. It was just merely left that way in my mind; if he accepted Les, then, why, he would have to accept mine, because I had known him a hell of a lot longer and certainly if he did him a favor in that respect he would no doubt take my dues too.

Q. Had anyone ever identified Smiley as an officer of the union?

A. Oh, I paid dues to him for months. I had a dues book and his signature——

Q. The fact of the matter is, he acted as an errand boy between you and the union office, didn't he, for several years?

A. That is right. Well, I wouldn't say several years, no. The other boy got into trouble, Bill Robert. Bill Robert was the boy that used to take them and after his difficulties, why, then Smiley took care of the dues.

Q. Who was the steward on nights?

A. We had no steward at nights except in the machine shop. Nunez, whenever he was on nights, why, he would be there—he worked nights and days. I never did contact him. I never knew whether he

(Testimony of Clyde W. Scheuermann.)

was working or not. The only time I knew Nunez was when Smiley refused me. I offered him dues the last time and that would be the time that I have a record of, and Elmer said, "I can't take dues from you. I have been told not to." [179]

So, as you say, I was always pretty close to the deadline and I have a very good reason for that too. I almost got my pants thrown out on it one time for being delinquent, because they don't send notices until you are almost to the end of your three-month period. You are granted three months' grace and then I would only pay $2.00, so then the very next month I would get another notice.

At one time I went nine months behind, when I belonged to Lodge 68, and that was during the war, when I was too damned busy to bother about union dues; when a good friend of mine died in the shop and I was trying to locate his book so I could fix up his benefits, I began looking up my own book and I began to get worried about it. I gave it to the shop steward in the shop and he took it with him, and I shouldn't have worried at all because when the book was returned there was a letter of apology from Mr. Howard saying during the war they were behind in their own work and they knew we were behind in our work, and it is perfectly all right; so then I got in the habit of paying just two months because if I paid three months I would be delinquent before I had paid another, so I just paid two months and that kept me in good standing.

(Testimony of Clyde W. Scheuermann.)

I think that answers your previous question. I did pay dues to Nunez because that is the only one in my record I have—that I paid to Nunez, because Smiley refused to accept them. I said to Nunez, "I don't want to put you on the spot. [180] Smiley refused to take them."

Nunez said, "Nobody told me not to take them." He said, "There is only one in my book, that is one for January," so he wrote on it "for January."

After that, without embarrassing anybody in the shop I paid them into the office.

Q. Now, isn't it a fact that each year when a new contract was arrived at, that it was customary for the union to send a notice to all of its members advising them of a special meeting to be held to consider the contract?

A. I believe it was customary. Ordinarily we all of us didn't get them, but there would be enough of them sent out that word would get around, yes.

Q. Isn't it a fact that some of your friends were union members in the Summer and Fall of 1949 and informed you of this special meeting that was held to consider the agreement that had been negotiated between Westinghouse and the I.A.M.?

A. No, I don't recall any special notice, that anybody went out of their way particularly to let me know.

Q. Well, isn't it a fact that in the normal course of conversation that came up and was discussed and you knew about it?

(Testimony of Clyde W. Scheuermann.)

A. What contract are you talking about, what year?

Q. I am talking about the present contract.

A. The one in effect now? [181]

Q. Yes.

A. No, I can truthfully say that all I knew about that contract was the rumor about the 2 per cent; that seemed to be the only part that was discussed in the shop.

Q. Then, is it fair to say, Mr. Witness, that you have no knowledge, that you never heard of a special meeting that was held on a Sunday so that all the night shift as well as the day shift employees could come and discuss the contract? A. No.

Mr. Bamford: That is in this year?

Mr. McGraw: 1949.

The Witness: I knew they had the meeting, yes. I didn't say that I didn't.

Q. (By Mr. McGraw): And isn't it a fact that you inquired of some of those that you worked around, that is, as to what had happened at that particular meeting?

A. I believe not. I don't recall there was any talk.

Mr. McGraw: Now, Mr. Trial Examiner, I think this is the proper time, in view of the other evidence that has been introduced, to make a motion to dismiss.

Mr. Bamford: Certainly—for one thing, there is further cross-examination, there is redirect exam-

(Testimony of Clyde W. Scheuermann.)

ination on Ollis and Scheuermann and the General Counsel hasn't rested. Perhaps you had better wait until that time.

Trial Examiner Parkes: I think we had better wait until [182] the General Counsel has rested its case in chief before you make your motion.

Mr. McGraw: I will wait, then, but it is quite clear there is nothing that could be adduced now that would alter the justification for [183] dismissal.

* * *

B. H. GOODENOUGH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford: [190]

* * *

Q. What is your occupation?

A. Manager of Industrial Relations, Westinghouse Electric Corporation, Pacific Coast Manufacturing and Retail District.

Q. And where do you maintain your principal offices?

A. The Westinghouse Plant at Sunnyvale.

Q. What are your duties as Industrial Relations Manager?

A. Well, the management of all personnel, in-

(Testimony of B. H. Goodenough.)

dustrial relations, and labor relations activities for the Pacific Coast District, which includes the hiring of employees, interviewing, the collective bargaining with the various certified bargaining units, responsibility for the Medical Department, the safety activities, group life insurance, annuity plans, a suggestion system—is that broad enough a description?

Q. Would it be within the province of your duties to act upon a request such as contained in General Counsel's Exhibit 6, a letter addressed to you?

A. All such correspondence from the various unions is directed to me.

Q. And would you act upon such correspondence? A. I would.

Q. And you had authority to act?

A. I have. [191]

* * *

FRANKLIN W. GORHAM

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford:

* * *

Q. What is your occupation, Mr. Gorham?

A. I am Assistant Business Agent of District

(Testimony of Franklin W. Gorham.)

Lodge 93 of the International Association of Machinists.

Q. Does District Lodge 93 bear any relationship to Local Lodge 504?

A. Lodge 504 is one of the Locals belonging to the District.

Q. Will you describe the relationship between the District and the Locals?

A. Well, for practical purposes the District maintains the Business Office and Business Agents for the various Locals belonging to the District, as provided under the Constitution of the International Association of Machinists.

Q. So that would you then occupy the position of Assistant [192] Business Agent for Local 504 as well as District Lodge 93?

A. I believe that might be right, yes.

Q. Now, what are your duties as Assistant Business Agent?

A. The negotiation and policing of contracts, in machine shops primarily, manufacturing plants.

Q. Are you appointed or elected?

A. Well, I am appointed subject to the confirmation by the membership of the Locals belonging to the District.

Q. How long have you been in this position?

A. Well, the District was formed in 1942. I have been the Assistant Business Agent of the District since that time. Prior to that time I was also an official.

(Testimony of Franklin W. Gorham.)

Q. And during all that time has Local 504 been in existence?

A. Local 504 has been in existence since 1902.

Q. When did it become an affiliate of District Lodge 93?

A. When the District was formed, in 1942.

Q. And it has remained in the District since that date, is that correct? A. It has.

Q. Who is Mr. Scott?

A. Mr. Scott is the Senior Business Agent of District 93. [193]

* * *

Q. Does the I.A.M. have stewards?

A. Yes.

Q. Has Mr. Smiley ever been a steward?

A. Yes, he has.

Q. For what period of time, if you know?

A. Oh, I would say approximately from 1946 to the present time.

Q. And what are the duties of an I.A.M. [194] steward?

A. The principal duties of the steward are to process grievances.

Q. Do they also collect dues?

A. They do in some cases, yes.

Q. And then transmit those dues to the head office, is that correct? A. That's right.

* * *

Q. But their duties remain the same, regardless of the method of their selection, is that correct?

(Testimony of Franklin W. Gorham.)

A. That's right.

Mr. Bamford: No further questions.

Trial Examiner Parkes: Mr. McGraw?

Cross-Examination

By Mr. McGraw:

Q. Do the stewards collect initiation fees?

A. Yes, they do. They collect payments on initiation fees as a convenience to the member or the respective members.

Q. Do they solicit new members?

A. Occasionally; prior to the Taft-Hartley law they didn't.

Mr. Holmes: What does that mean?

Q. (By Mr. McGraw): Does the steward issue any dues stamps or place any marks in the member's book? [195] A. No, he does not.

Q. Does he do anything other than issue a receipt and transmit the money to the union office for proper accounting? A. No.

Q. Do you have authority to admit or deny membership to any applicant? A. No.

Q. Does Mr. Scott have any such authority?

A. No.

Q. Does any steward have that authority?

A. No.

Q. In fact, it requires action of the Lodge in each individual case, doesn't it?

A. That is right. [196]

* * *

LESLIE E. HOLLIS

resumed the stand, was examined and testified further as follows:

Cross-Examination
(Continued)

Mr. McGraw: In view of some of our discussion this afternoon and the rulings made by the Trial Examiner, I won't take nearly as long as I had anticipated when we adjourned two days ago.

By Mr. McGraw:

Q. Mr. Ollis, shortly after you were notified about your trial were you notified of the action of the Lodge with regard to your trial?

A. I received a registered letter notifying me of the results of the trial by Local 504 and considerable later I received a verification, or whatever it is called, from the International Machinists. [197]

Q. Between that time that you were notified of the action of the Lodge and the time of your discharge, did you file any appeal with the Grand Lodge or with the Local Lodge concerning their action in expelling you?

A. Only to ask the trial be delayed because it was held on swing shift, when I worked.

Q. But you made no appeal from the verdict or decision of the Lodge?

A. No, I made no appeal from the verdict.

Q. Now, during that same length of time, from the time that you were notified that you were expelled until you ceased to work for Westinghouse,

(Testimony of Leslie E. Hollis.)

did you make an application to the Lodge for reinstatement?

A. Unless you consider offering dues an application, I did not.

Q. Now, if I understood your testimony several days ago, you testified that they had advised you that you better see Gorham.

Can you tell us who "they" were?

A. I believe that Emil—you repeated his name many times here——

Mr. Holmes: Tonascia.

The Witness: Tonascia. I believe he advised me of that and in a talk one evening after work in the locker room; possibly others, too.

Q. (By Mr. McGraw): Now, as a result of those suggestions that [198] you had better see Gorham, did you ever go to See Mr. Gorham prior to the time that your employment was terminated?

A. I saw him only once in the shop. I never went to see him, and at that time I didn't talk with him.

Q. Did you ever visit the union office for the purpose of speaking to anyone concerning reinstatement?

A. Well, I visited the union office at that meeting, which was one of the causes of my being kicked out, but I believe the trial was later—I am quite sure the trial was later, because that was the basis of some of the charges.

Q. Then, if I understand your testimony correctly, after your trial, and you were notified that you were no longer a member, you did not go to

(Testimony of Leslie E. Hollis.)

the union office and apply for reinstatement or talk to any representative of the union at the union office?

A. I talked only to representatives of the union at work.

Q. Do you know who the night steward was?

A. Yes. I think I do. I am not sure he was on all of that period, but part of that period he was. What the hell was his name—Well, you obviously know what it is.

Q. I am asking you.

A. I know, but I know the fellow—he had a couple of gold teeth in front and I do know his name, but I can't think of it right now.

Mr. Bamford: Perhaps counsel can refresh his recollection.

Q. (By Mr. McGraw): Do you know what position Nunez has? [199]

A. Nunez is the man I am referring to.

Q. And did you ever make an application to him for reinstatement or did you ever ask him for an application blank for reinstatement?

A. No, I talked very—only a few times with Nunez, and perhaps that was even before the election. I believe it was. He didn't work near me, as I have told you before.

Q. How long did you work at Westinghouse?

A. Approximately two and a half years.

Q. During that time did you attend any special meetings called to consider acting on a contract between the company and the union?

A. I believe I attended nine out of ten of all

(Testimony of Leslie E. Hollis.)

meetings, whether they were regular or special, prior to the time I was put on swing shift.

Q. Now, you know for a fact, don't you, that it was customary to notify all the union members of special meetings in order to consider whether or not they would accept or reject a proposed contract?

A. That was one reason for notifying them; the other one was the attendance was barely sufficient to be able to decide anything.

Q. And you know that just shortly before your termination, that a special meeting was held for the purpose of acting on either accepting or rejecting the contract? [200]

A. No, I am not sure that I do. I don't believe that I did know of it. I know of it now. Conceivably I could have known of the union meeting——

Q. Well, isn't it a fact that some of those men who were riding to work with you told you that they had received such a notice?

A. No, not to my knowledge. I heard no one of that group, and I believe of any other group, tell me that they had received such a notice. I certainly never saw a printed notice posted.

Mr. McGraw: That is all.

Trial Examiner Parkes: Mr. Bamford, do you have anything on redirect?

(Testimony of Leslie E. Hollis.)

Redirect Examination

By Mr. Bamford:

Q. Now, I believe you related on cross-examination that you specifically recalled two attempts to pay dues to Smiley prior to this last principal attempt that you testified to, isn't that correct?

Mr. Holmes: What do you mean by "principal attempt"? I think that is a characterization that should be stricken from the record.

Mr. Bamford: It may be stricken, the word "principal" may be stricken.

Q. (By Mr. Bamford): Do you understand the question?

A. I believe I do. The last time I paid dues to Smiley was just prior to my being laid off and before that I originally [201] testified that several times I had offered to pay dues, and that must have been at least two or possibly three or even four times that I talked to Smiley—several times, certainly.

Q. Did you relate these incidents to Clyde Scheuermann? A. Certainly I did.

Mr. Bamford: No further questions.

Recross-Examination

By Mr. Holmes: [202]

* * *

Q. Never later?

A. Sometimes later. The time mentioned when I talked to Smiley in the locker room being one of the examples of the times I started to work later.

(Testimony of Leslie E. Hollis.)

Q. Did you start to work late that day?

A. Evidently.

Q. Do you know?

A. I talked to Smiley and he was getting off shift—Either he came off early, and knowing both him and myself, I think it is more likely he worked until 4:30 and I didn't start promptly at 4:30.

Mr. Holmes: That is all.

Trial Examiner Parkes: Anything else?

The Witness: I have one thing—I don't know. I swore to tell the truth, the whole truth and nothing but the truth. Now, it seems to me that it isn't quite the whole truth. There are other things I have to say.

Trial Examiner Parkes: Well, unless——

The Witness: Am I permitted to say them, or——

Trial Examiner Parkes: Unless you want to change your testimony.

The Witness: No, I don't want to change any of the testimony.

Trial Examiner Parkes: Well, I think then that we wouldn't be interested in anything else. You undoubtedly have [203] been interviewed by Mr. Bamford before he put you on the stand; at least, I assume all counsel interview friendly witnesses. Otherwise, it is largely a waste of the Trial Examiner's time and also the time of other counsel. [204]

* * *

Trial Examiner Parkes: Mr. McGraw, do you have anything additional?

Mr. McGraw: Yes, sir. Respondent union, of course, joins and underlines the statement of Respondent company. In addition to that, we would like to point out that no copy of the Charge has been filed on Respondents, as required by law and that at the present time we have in effect a proposal to amend a Complaint that is totally unsupported by a charge. Without repeating some of the things that the Counsel for Respondent Company said, I would like to point out that to permit an amendment under these circumstances and on this set of facts is to, frankly, open the door and to provide General Counsel with an opportunity for unending harassment of the [229] Respondent company and the Respondent union and to take away the protection of the law, the protection the law has specifically granted, by making and establishing a time limit in which a charge could be filed. Even without this amendment, it is the position of Respondent union that General Counsel is trying to distort, circumvent, pervert and subvert the meaning of the Act, and if anything tends to prove that this effort on the part of the General Counsel to amend the Complaint at this time can have no other meaning. Certainly, it is improper and we think that it is illegal and we think that because of the express provisions of the law that the Trial Examiner has no authority to grant such an amendment at this time under this set of facts.

Trial Examiner Parkes: Mr. Bamford, would you like to be heard?

Mr. Bamford: If you please, Mr. Examiner.

Starting with the last first, I should like to state in answer to Mr. McGraw's accusation that General Counsel is attempting to pervert and subvert the purposes of the Act, only this: the matters contained in Mrs. Andersen's testimony yesterday, and which have been pleaded in the amendments to the Complaint filed this morning first came before the attention of the National Labor Relations Board yesterday morning at 10:00 o'clock. I had never heard the name John Marovich before. I never heard the name of Mrs. Chloe Andersen before, and I knew [230] nothing of the new allegations of the Complaint. Mrs. Andersen's possible testimony, as I say, came before me yesterday morning. I saw her yesterday morning, and in order to expedite the trial called her as a witness yesterday afternoon. I consider it the duty of the General Counsel and myself as an agent of the General Counsel to initiate and to prosecute unfair labor practices which have occurred whenever it is lawful to do so. I believe sincerely that the matters pleaded have occurred and I don't intend to harass Counsel. [231]

* * *

Mr. Holmes: I am just as certain the authorities will not support him. Even the case which he has grasped, Cathey Lumber I think he mentioned, and the best he could rely on, he admitted to be dicta. Now, as to the theory upon which my opposition

is based, it isn't necessarily what Mr. Bamford has interpreted it to be. I think I stated it quite plainly and I did not base it upon surprise. I think there are good, sound grounds, quite apart from that. Surprise would be a basis for asking for a continuance and I reserve that right but my opposition to the motion is not based upon the matter of surprise; my opposition is based upon the theories which I previously stated. Now, Mr. Bamford contends that it is permissible to amend the Charge. That may be true under certain circumstances. There is nothing in the Rules and Regulations, however, which permit it. Perhaps the Board has done so, perhaps Courts have upheld them in that. However, there are some limits to it. Certainly an amendment to a Charge must be germane to the original charge and the amendment to this Charge pertains to a wholly separate and new case. What the General Counsel is attempting to do here is to try to get a case tried which has been outlawed and he is trying to do it through the sham of amending the original charge pertaining to a different case. [237] Now, that is clearly a type of amendment to a charge which is not permissible and which would be an abuse of the discretion of the Trial Examiner, if he has any discretion in this matter. Where attempts to amend charges have been permitted, and I am certain the authorities will sustain me—the amendments have been germane to the original charge. They have not pertained to wholly separate cases. Now, the only thing that possibly connects Mr. Scheuermann with Mr. Marovich is the statement of one witness that she heard both of their names mentioned, not

together, separately. She heard their names mentioned separately, but in the course of a discussion which she was listening to when she wasn't invited. Now, that is not such a connection as to make Mr. Marovich's case Mr. Scheuermann's case or vice versa or to make them inextricably connected so that they can be the subject of the same charge or that one can be brought in as an amendment to the charge of the other almost a year later. It just has nothing to do with it, despite the fact that one witness says that she heard their names mentioned, not together but separately, in the course of one discussion. The Charge must be based upon acts occurring within six months prior to the filing of the charge. [238]

* * *

Mr. Holmes: If this amendment were permitted, there would be no limit to amendments to charges and complaints. It is not in the record yet, but Westinghouse laid off almost a thousand employees during the fall of 1949. Now, if Mr. Bamford can and Mr. Scheuermann can amend the Complaint and the Charge respectively, what is to prevent them from amending the Charges and Complain for a thousand employees, some of whom may feel that they were discriminated against in the course of their layoffs or discharges. There is simply no limit to it, if this is allowed. [241]

* * *

Mr. McGraw: Just a minute, Mr. Trial Examiner. First of all, I want the record to show, if you

please, we take exception to your ruling permitting the Complaint to be amended; secondly, we want to answer the Amended Complaint at this time by verbally denying it specifically and categorically.

Trial Examiner Parkes: Very well. Do you wish to reply, Mr. Holmes?

Mr. Holmes: We want to reserve the right to file a written amendment to our Answer, answering the Complaint, and also to file a written motion to dismiss the amendment to the Complaint.

Mr. Bamford: May I say one word? I would appreciate it if Counsel would file either a written answer or state the precise amendments to their present answers as soon as possible. I realize that they will have to have time to think about it.

Mr. Holmes: I think the law gives you five days or ten days.

Mr. Bamford: It doesn't, as a matter of fact, but it lies within the discretion of the Trial Examiner. [251]

Trial Examiner Parkes: Well, I am certain we can't expect him to give his answer today.

Mr. Bamford: No, I just say I would like to have the answers as soon as possible because my future trial of the case may depend upon the answers. [252]

* * *

MRS. CHLOE ANDERSEN

resumed the stand, was examined and testified further as follows:

Cross-Examination

By Mr. Holmes:

Q. Mrs. Andersen, I understood Mr. Bamford to say that you had to get back to work, is that right? A. Yes.

Q. Where are you working?

Mr. Bamford: Objection, irrelevant.

Mr. Holmes: I don't think it is at all irrelevant, and I think if I may ask a few more questions I can show why it is relevant. May I reserve that question for the moment?

Trial Examiner Parkes: All right.

Q. (By Mr. Holmes): When did you last work for Westinghouse? [253]

A. Up until, I think it was April, April or May.

Mr. McGraw: I am sorry, I can't hear you.

The Witness: Oh, I am sorry.

Q. (By Mr. Holmes): Up until April or May?

A. Yes, when I went on my vacation. I am not sure, I am not exactly sure of the date.

Q. You are not sure of the date?

A. The exact date.

Q. Then, you went on a vacation? A. Yes.

Q. For how long?

A. I had two weeks' vacation.

Q. You had two weeks' vacation?

A. Yes. Then I had a thirty day leave of absence after I came back from my vacation.

(Testimony of Mrs. Chloe Andersen.)

Q. And did you work after you came back from the thirty day leave of absence?

A. No, then I went on disability for thirty days?

Q. You went on disability for thirty days?

A. Yes.

Q. And are you still on disability?

A. No, I wrote Mr. Everett a letter about two weeks ago.

Q. What did that letter state?

A. It stated that my doctor had advised me not to return to the type of work I was doing at Westinghouse. [254]

Q. What type of work was that?

A. It was inside of an office, with no windows, and I didn't get any fresh air. My health was very run down at the time. My blood pressure was very low and he suggested I get out in the open.

Q. What type of work are you doing now?

Mr. Bamford: Objection.

Trial Examiner Parkes: Overruled.

A. I am now out in the open.

Q. (By Mr. Holmes): What kind of work are you doing?

A. I am working in a caddy house.

Q. At a golf course?

A. Yes, at a golf course.

Q. What are you doing, selling golf equipment or golf balls? A. Taking green fees.

Q. How long have you been working there?

A. Since last Friday.

Q. Since last Friday? A. Yes.

(Testimony of Mrs. Chloe Andersen.)

Q. When did you go off the disability roll?

A. I think I wrote that letter about two or three weeks ago. I am not sure.

Q. I am referring not to the time you wrote the letter. I say, when did you go off the disability roll; when did you cease receiving disability payments? [255]

Mr. Bamford: Objection. I fail to see the relevancy of this line of questioning.

Q. (By Mr. Holmes): Were there any disability payments——

Mr. Bamford: Just a minute. There is an objection pending.

Trial Examiner Parkes: He changed his question.

Mr. Bamford: Could I hear the question, please.

(Question read.)

Mr. Bamford: Objection, irrelevancy.

Trial Examiner Parkes: Overruled. You may answer.

A. The first thirty day leave of absence I had I was on sick leave and I received three weeks' pay for that.

Q. (By Mr. Holmes): But you didn't receive any pay after that? A. No.

Q. Have you notified Westinghouse that you are not returning?

A. I think that letter stated that I would not return to that type of work, that I would come and see them in case they had anything else.

Q. What kind of work were you doing just before you left? A. Copy typist.

(Testimony of Mrs. Chloe Andersen.)

Q. Where? A. In Building 41.

Q. What was the department?

A. I was across the hall from Mr. McAuliffe's office, in that [256] little office with no windows, but I was working for Mr. Spedding, who was a manufacturing engineer.

Q. Was that the last work you did before you left? A. Yes, sir.

Q. Weren't you transferred before you left to a department called Project "N"?

A. I was, but I was still across the hall. I was still in Building 41.

Q. You were still working in Building 41?

A. Yes, my office was there.

Q. But you were working on materials pertaining to the so-called Project "N"? A. Yes.

Q. You were? A. Yes.

Q. Did you undergo a security screening with respect to your work on this Project "N"?

Mr. Bamford: Objection, relevancy.

Mr. Holmes: I think it goes to the credibility of the witness.

Mr. Bamford: Well, I don't see how it does now. Perhaps Counsel can make an offer of proof.

Mr. Holmes: Well, I want a ruling on it first before I make my offer of proof.

Trial Examiner Parkes: I don't see that it is particularly [257] material. You can make an offer of proof.

Mr. Holmes: Yes. I offer to prove that this witness was, prior to the time that she left Westing-

(Testimony of Mrs. Chloe Andersen.)

house, assigned to work in connection with the so-called Project "N," which is a Government project which requires that the employees undergo a security screening, and that this employee did undergo such a security screening and that she was denied permission to work on Project "N" because of a ruling on the security screening and I think that goes to the credibility of this witness.

Mr. Bamford: A ruling by whom?

Mr. Holmes: By the United States Navy Security Officer, who worked in connection with that project "N" at the Westinghouse Plant and I am going into it, as I say, because I think it affects the credibility of the Witness.

Mr. Bamford: If I may be heard on Counsel's Offer of Proof?

Trial Examiner Parkes: Yes.

Mr. Bamford: Even granting—assuming that the offer of proof is correct, I fail to see that the acceptance or rejection of the witness by a Navy Security Officer in any way, shape or form affects her credibility at this hearing for matters which occurred a year ago, as I think it is common knowledge that the acceptance or rejection of the Security Officer may be based upon many grounds, practically all of which have nothing to do with the credibility of the witness, but [258] usually—and I don't know anything about this matter at all—but usually they are based upon political affiliations or affiliations with one of the hundreds of organizations on the Attorney General's list; and I assume,

(Testimony of Mrs. Chloe Andersen.)

for instance, that this witness had once given $5.00 to the Joint Anti-Fascist Refugee Committee. That, I suppose, would probably, in this time of stress, be enough to cause enough doubt in the mind of the Security Officer, in view of the importance perhaps of the project, to reject the witness, but it seems to me that the $5.00 to the Joint Anti-Fascist Refugee Committee has nothing to do with this witness' credibility at all. It is entirely immaterial.

Mr. Holmes: Mr. Bamford would attempt to minimize it, of course, but this occurred prior to the Korean War. This did not occur since the Korean War. This occurred in April or May and I think it goes to the credibility of the witness.

Trial Examiner Parkes: The objection is overruled. You may proceed.

Mr. Bamford: May I have a continuing objection and exception?

Trial Examiner Parkes: Yes, you may have a continuing exception to the line.

(Question read.)

The Witness: I filed an application.

Q. (By Mr. Holmes): Did you fill out a questionnaire? A. Yes. [259]

Q. Do you know with whom you filed it?

A. Colonel Allen.

Q. Colonel Allen? A. Yes.

Q. Is he the Navy Security Officer who works at the plant in connection with this Project "N"?

A. I think he is.

(Testimony of Mrs. Chloe Andersen.)

Q. Do you know what the result of your filing that questionnaire was?

A. No, I don't. Like you just said—it is news to me.

Q. How long have you worked for Westinghouse? A. Approximately seven years.

Q. Where did you first work for Westinghouse?

A. In Bloomfield, New Jersey.

Q. How long did you work there?

A. Two and a half or three years.

Mr. McGraw: I am sorry, I can't hear any of the answers.

The Witness: About two and a half or three years.

Q. (By Mr. Holmes): Then there was a break in your work for Westinghouse?

A. Then I moved to California.

Q. You moved to California? A. Yes.

Q. When was that? [260] A. In 1941.

Q. Did you go to work for Hendy?

A. Yes.

Q. The predecessor in the premises occupied by Westinghouse? A. Yes.

Q. Then, when Westinghouse took over the plant in 1947 did you resume work for Westinghouse?

A. Yes.

Q. I see. What kind of work were you doing?

A. At that time I was timekeeper.

Q. You were timekeeper? A. Yes.

Q. How long were you a copy typist?

A. A year ago last October I think I was hired

(Testimony of Mrs. Chloe Andersen.)

as a copy typist. I think in October of 1948.

Q. Were you transferred from some other job to the typing?

A. No, my job as a timekeeper had been eliminated and I was out of work for about eleven months or twelve months. Then I was rehired.

Q. Oh, you were rehired—as a new employee, do you know?

A. I think that is the procedure.

Q. Well, I just want to know whether you knew or not. Were you hired as an employee with seniority or with service or were you hired as a new employee in this new job?

A. I was hired, I think, as a new employee, and after six [261] months you regain your old service.

Q. And you went back to work for Westinghouse as a copy typist in about October of 1948, is that correct? A. Yes.

Q. What department did you work in?

A. Manufacturing Engineers.

Q. What is the office in which you worked?

A. It was upstairs over what is the grinding room in Building 41—at that time.

Q. Is that near Mr. McAuliffe's office?

A. Not then, no.

Q. It is not? A. No.

Q. Where is his office?

A. His office is downstairs.

Q. In Building—— A. 41.

Q. How long did you work in that upstairs office?

(Testimony of Mrs. Chloe Andersen.)

A. We only stayed there two or three months, then we moved.

Q. Where did you move?

A. Across the hall.

Q. Still upstairs? A. Yes.

Q. How long did you remain there?

A. Just a few months, and Mr. Bradford was terminated and we [262] were split up.

Q. Where did you go when you were split up?

A. The men went out in the shop, in various offices; that is, the manufacturing engineers, and I went downstairs in the little office across the hall from Mr. McAuliffe.

Q. What month was that, about?

A. That was, I think, in July.

Q. Then, did you remain there? A. Yes.

Q. Until the time you left Westinghouse?

A. No.

Q. How long did you remain there?

A. It was sometime before the first of the year, I was transferred out into a shop office.

Q. In Building 41? A. In Building 41.

Q. What office was that?

A. The Office of Department R24.

Q. Who is the Supervisor there?

A. Tommy Shields.

Q. How long were you there?

A. I don't know—several months. I was there through the holidays until Bob Spedding was made Supervisor of the Manufacturing Engineers. Then

(Testimony of Mrs. Chloe Andersen.)

he asked me to come to work for him on [263] Project "N."

Q. When was that?

A. I think it was in May.

Q. Of this year?

A. No, no. The latter part of February or March, I think it was. I think I could tell you if I looked at some papers I have here.

Q. Please look at them—if I may look at them, too.

A. Oh, you may. I am not sure that that has the date on it, but if it does—I had to make this copy—no, it doesn't have the date. It is just all the places that I worked.

Q. You mean the departments or the companies?

A. No, all the places I worked all my life. I keep that for when I fill in applications and they want to know your past record.

Q. They want to know where you worked?

A. Yes. I can figure it out from this.

Q. Then you don't know the exact dates when you were shifted?

A. No, we kept moving around and relieving each other so much that I don't recall the exact date.

Q. You say you worked for Mr. Shields for a while? A. Yes.

Q. How many months?

A. It must have been four or five, at least.

Q. Who else did you work for?

A. At that time, that same time, I was still working for the [264] manufacturing engineers.

(Testimony of Mrs. Chloe Andersen.)

Q. And who was your supervisor, or who were the supervisors?

A. Mr. McAuliffe had taken charge of the manufacturing engineers.

Q. Did you have any direct contact with Mr. McAuliffe?

A. No, just with the manufacturing engineers.

Q. And who were the manufacturing engineers?

A. There was Ray Tassi, Bob Owens——

Q. Owens?

A. Bob Owens, Jack Staunton.

Q. Yes, any more? A. And Bob Speeding.

Q. Any more?

A. Russell Meredith. I think that was all they had at the time.

Q. Now, how long did you work for those men?

A. I had been working for them ever since I went as a copy typist.

Q. You spent nearly all of your time working for them?

A. No, not all of it. I mean—but I always did the copy typing for the manufacturing engineers.

Q. I think I see. Well, I want to know what other supervisors you worked under besides Mr. Shields, of course.

A. Well, I think Larry Silva is considered a supervisor?

Q. Silva? [265] A. I think.

Q. And who else? I mean directly, not remotely. I mean directly, who was your supervisor?

(Testimony of Mrs. Chloe Andersen.)

A. Well, that is all.

Q. Are those all? A. Yes.

Q. Who gave you your work to do regularly, who talked to you about your work, told you what to do and when to do it? A. Practically no one.

Q. Practically no one? A. No.

Q. Well, where did you get most of your work?

A. They just dropped in and dropped it on the desk.

Q. Who do you mean by "they"?

A. The manufacturing engineers, and Tommy Shields and Larry Silva.

Q. That is seven individuals altogether, is that right? A. Yes.

Q. Five manufacturing engineers and Shields and Silva, is that right? A. That's right.

Q. What connection did you have with Mr. Buckingham as far as your work was concerned?

A. As far as my work was concerned I don't know I had anything. [266]

Q. No connection with him?

A. Except that everything I typed for his department—I think it was his department.

Q. I see, but did you have any direct connection with him in the course of your work? A. No.

Q. Where was his office with respect to yours?

A. Out in the shop, in the same building.

Q. But that is a large building, isn't it?

A. Yes, it was several hundred feet from my office.

(Testimony of Mrs. Chloe Andersen.)

Q. You had no direct connection with him in the course of your work?

A. Not unless he wanted a blueprint or something and I got it for him.

Q. Did he come personally for that or send somebody? A. He usually sent somebody.

Q. What direct connection did you have with Mr. Harrison in the course of your work?

A. His office was right across the hall from the one I had when I worked in the shop. I used his adding machine.

Q. You used his adding machine?

A. Every day.

Q. You say you were in the shop for how long?

A. I think four or five months.

Q. And can you give me the dates of those [267] months, approximately?

A. No, I can't. It was before the holidays.

Q. Before the holidays in 1949, or was it before the holidays in 1948?

A. It was before the holidays in 1949, shortly before the holidays.

Q. Was it during the fall of 1949?

A. Yes.

Q. You say it was four or five months; would that be from August to December or just what months would it be, out in the shop?

A. I think it was probably November, December, January, February and March.

Q. November to March?

A. Now, wait a minute. I know I was there in

(Testimony of Mrs. Chloe Andersen.)

October because I took a vacation then. I was there in October.

Q. Is that when you started, as far as you can recall? A. I think it must have been October.

Q. And you started to work out in the shop in October of 1949, and you were out there four or five months?

A. I was out there until after the holidays, until Bob Speeding asked me to go with Project "N."

Q. In the spring of 1950? A. Yes.

Q. That was the period, then, when you had some connection [268] with Mr. Harrison in the course of your work, is that right, from October, four or five months forward? A. Yes.

Q. Then you hadn't had any connection with Mr. Harrison in your work prior to that time, is that right?

A. I had talked to him many, many times, but as far as my work was concerned, no.

Q. What did you talk to him about?

A. Just generalities.

Q. Was his office near yours—he wasn't out in the shop, was he?

A. He has an office right there in Building 41.

Q. Yes, but it is not in the shop, is it?

A. It is just a few hundred feet from mine. One was at one end of the office and one at the other. You had to go by his office to get to mine.

Q. When you went to work? A. Yes.

Q. How is it you became acquainted with Mr. Harrison and talked to him?

(Testimony of Mrs. Chloe Andersen.)

A. The same way you become acquainted with anyone you work with.

Q. But you didn't work with him during the day? A. No.

Q. Was it just a matter of saying "Good Morning" or "Good [269] Night"?

A. Talking about dogs and hunting. He is quite a sport.

Q. You had talked to Mr. Harrison about that?

A. Yes, talked about baseball, anything that happened to be——

Q. On what, a few occasions?

A. Not often, no; on a few occasions.

Q. Would they be talking about dogs and baseball and so on after you were working near his office and using his adding machine and in his office more frequently, is that when you talked to him about hunting and baseball and so on?

A. Yes.

Q. I want to know about prior to that time. Had you talked to Mr. Harrison other than a casual greeting when you were going to or leaving work?

A. No, I can't tell you how many times I have talked to him, but——

Q. Well, isn't it a fact that you were not particularly friendly with Mr. Harrison until you were working in the vicinity of his office and were using his adding machine? A. That's right.

Q. And you talked to him only as a matter of

(Testimony of Mrs. Chloe Andersen.)

greeting before that time, saying "Hello" or "Good Morning" or something of that sort?

A. Unless at the time I was in the upstairs office—they [270] used to come to the manufacturing engineers for information. I would get it out of the files for them and talk to them about work.

Q. Did Mr. Harrison ever do that?

A. Yes, he did, on several occasions; not often.

Q. In the course of your work what occasion did you have to talk to Mr. Goodenough?

A. I didn't have any.

Q. None at all? A. No.

Q. You never talked to Mr. Goodenough?

A. I would bid him the time of day when I met him.

Q. Was that all? A. That is all.

Q. On what occasion did you converse with Mr. Gorham?

A. I just bid him the time of day, too.

Q. Where was that? A. In the shop.

Q. He was in there occasionally? A. Yes.

Q. Now, do you know a Mr. Culbertson?

A. Yes.

Q. Where did he work?

A. He had an office right next to Mr. McAuliffe's secretary.

Q. And did you have occasion in the course of your work to [271] talk to Mr. Culbertson?

A. Yes, I did.

Q. Regularly? A. Yes.

Q. Often? A. Quite often.

(Testimony of Mrs. Chloe Andersen.)

Q. Was that whenever your office was in that vicinity—I presume? A. And before.

Q. And before? A. Yes.

Q. What about when you were out in the shop?

A. And when I was out in the shop, too.

Q. Did you have to go in to see Mr. Culbertson regularly? A. Yes.

Q. Do you know Mr. Clark?

A. Of the Engineers?

Q. Mr. Kermit Clark? A. Yes.

Q. You know him?

A. I know him when I see him.

Q. You know him when you see him?

A. Yes.

Q. Do you know him personally?

A. No. [272]

Q. Did you ever talk to him?

A. I don't think so, except perhaps to say "Good Morning."

Q. Do you know a Mr. Ghiorso, Emil Ghiorso? Perhaps I can refresh your recollection. I might state he is a foreman over in Building 61.

A. No.

Q. You don't know him?

A. I don't think so.

Q. You never talked to him as far as you know?

A. No.

Q. Do you know a Mr. Huffman, Sheldon Huffman? A. Yes, I do.

Q. That is, do you know him when you see him, or are you personally acquainted with him?

A. Well, I know him like I know the other fore-

(Testimony of Mrs. Chloe Andersen.)

men in the shop. I had to do a lot of work for him and with him and—well, I just know him.

Q. When did you do work for him or with him?

A. When I was in the Timekeeping Department. He was a foreman in the Welding Department. We had to have the foreman sign time cards.

Q. Every time card? A. They used to.

Q. They normally signed those before you got them, didn't they? [273]

A. Yes, but once in a while they missed one.

Q. If they missed one you would go and get him to sign it? A. Yes.

Q. After that period when you worked in the timekeeping office—that was in 1947?

A. That was prior to this period.

Q. That was 1947, isn't that right?

A. Yes.

Q. After that time, say, after you became a copy typist, what occasion did you have to have anything to do with Mr. Huffman in the course of your work?

A. He came to the office quite often for blueprints, for operation sheets, additional copies of operation sheets.

Q. And would you say you saw him often or regularly?

A. I would say I saw him at least once every day.

Q. At least once every day; then you saw him a good deal more than you did some of these other people, didn't you? A. Yes. [274]

* * *

(Testimony of Mrs. Chloe Andersen.)

Q. I don't mean while they walked in; I mean after they were in there and talking, were you sitting at your desk, continuing with your work, or were you sitting there watching them?

A. I couldn't see them from the desk.

Q. That is what I wanted to know.

A. No.

Q. You saw them walk in?

A. And then I saw them at least twice, perhaps three times, while they were talking, when I had occasion to walk past the door into Mr. Culbertson's office with the work that I was doing at that time.

Q. That was just a momentary glance while you were walking past the door, wasn't it?

A. That's right.

Q. How long would you say that conference or conversation or discussion lasted?

A. Approximately a half hour.

Q. Half an hour? A. Approximately.

Q. And except for these two occasions when you walked past the door of Mr. Culbertson's office, and I presume returned to your own desk, you could not see them, could you? A. No.

Q. I believe you stated that Mr. Gorham left before the [275] other gentlemen did?

A. Yes.

Q. Now, can you state how much before the bulk of them left, Mr. Gorham left?

A. He only stayed about five minutes.

Q. I see. With whom have you discussed this matter prior to your testimony here?

(Testimony of Mrs. Chloe Andersen.)

A. I have discussed it with Mr. Scheuermann.

Q. On what occasion?

A. The night it happened.

Q. The night it happened; did you go to his home? A. No.

Q. How did you happen to discuss it with him?

A. I had taken his brother to the ball game and he picked him up at my house on his way home from work.

Q. On Mr. Scheuermann's way home from work?

A. Yes.

Q. That was a night ball game? A. Yes.

Q. And you told him about it at that time?

A. Yes.

Q. Was anybody else present? A. Yes.

Q. Who? A. My husband. [276]

Q. Who else? A. And Les Ollis.

Q. Who else?

A. Mr. Scheuermann's brother, and myself.

Q. May I have your husband's initials or first name? A. Val Andersen.

Q. Does he work for Westinghouse?

A. No, he doesn't.

Q. Who had been to the ball game besides yourself and Mr. Scheuermann's brother?

A. I think that is all. We might have taken some children that night, but I don't remember. We usually pick up a few.

Q. And after that occasion when did you next discuss this matter with someone?

A. Yesterday, when I discussed it with the attorney.

(Testimony of Mrs. Chloe Andersen.)

Q. You discussed it with Mr. Bamford yesterday? A. Yes.

Q. With whom else have you discussed it?

A. I don't recall that I have discussed it with anyone except the parties concerned.

Q. You say except the parties concerned?

A. Yes, Mr. Ollis and Mr. Scheuermann.

Q. You discussed it with Mr. Ollis also?

A. He was present that night.

Q. Have you discussed it with him since that time? [277] A. Yes.

Q. When? A. Oh, on various occasions.

Q. Well, how many times?

A. I can't tell you how many times.

Q. Several times with Mr. Ollis, would you say?

A. Yes, very recently I have discussed it quite often.

Q. On what occasions did you discuss it with Mr. Ollis? Did he come to you and ask you about it or did you go to him to tell him about it?

A. There were no occasions—we had been discussing Clyde's trial and we would just talk about it.

Q. And you would mention this matter again?

A. Yes, but that has been very recently.

Q. Well, how recently?

A. Since he was called to San Francisco for the hearing.

Q. You mean in the past week?

A. I would say in the past week.

(Testimony of Mrs. Chloe Andersen.)

Q. And you have discussed it several times with Mr. Ollis, is that correct?

A. (Affirmative nod.)

Q. I say, is that correct?

A. That's right.

Q. And you discussed it with Mr. Scheuermann more than this one occasion, haven't you? [278]

A. Yes.

Q. Several times with Mr. Scheuermann?

A. Yes.

Q. When? A. I don't know just when.

Q. Well, in the past week or several months ago?

A. Oh, I discussed it quite a bit with him in the past week—haven't seen much of him in the meantime.

Q. Have you discussed it with him between last September and the beginning of this trial here, a few days ago? A. I think I have.

Q. How many times? A. I don't know.

Q. Do you know the occasions? A. No.

Q. Have you ever discussed the matter with Jack Kraft?

A. I think he was in on some of the conversations when I discussed it with Mr. Ollis.

Q. Mr. Kraft was?

A. I think he heard it. I didn't go to him directly to discuss it with him, but he might have heard it. [279]

* * *

Q. (By Mr. McGraw): Did I understand you to say a few minutes ago that you discussed this

(Testimony of Mrs. Chloe Andersen.)

with Mr. Scheuermann on the same day that you heard it? A. That's right.

Q. And what time of the day was it?

A. About 1:00 o'clock in the morning, I think.

Q. About 1:00 a.m.? A. That's right.

Q. And did I also understand you to say that they had been to a ball game?

A. No, I had been to a ball game.

Q. Oh, I see; and who was playing and where?

A. It was out in Municipal Stadium, the Red Sox were playing somebody but I don't know who, at the time.

Q. Now, yesterday I believe you testified that you had heard Mr. Gorham speak many times. Can you tell us where some of those times were?

A. I have heard him speak to the men in the shop; I have heard him speak to the men in the cafeteria; I have heard him speak in the conference room, which was right next to my office. I have heard him speak in Mr. McAuliffe's office.

Q. And on how many occasions would you say you heard him speak? A. Twenty or thirty.

Q. And were these meetings that were held inside the plant? [283] A. Sometimes.

Q. Well now, when he was talking to the men in the cafeteria, was that just a small group or was it an organized group or what?

A. Just somebody sitting at a table eating their lunch. [284]

* * *

JOHN MAROVICH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford: [288]

* * *

Q. When did the company first inform you that you were going to be discharged?

A. It was on a Tuesday night, just prior to quitting time. My foreman, Tom Shields, come over and he told me, "Johnnie," he says, "I have to let you go." He says, "Tomorrow will be your last day."

Q. That would be Tuesday, September 19?

A. That is it.

Q. Now, where did this conversation take place?

A. Right by the machine I was operating.

Q. Was there anyone else present within earshot?

A. No, sir, not near us.

Mr. Bamford: Counsel for the Respondent union has pointed out that I mistakenly referred to the 19th of September as Tuesday. It appears from his calendar that it was Monday.

Q. (By Mr. Bamford): Did you reply to Shields?

A. Yes, I asked him, I says, "On what ground am I being terminated?" and he told me, he says, "Well,"—I asked him, [291] "Am I being terminated under the contract we have here for going

(Testimony of John Marovich.)

down by seniority rights and if it is my turn," I says, "I have no objection." And he told me, he says, "No, Johnnie, it isn't that. It is just the idea," he says, "You are just not cutting the buck." He says, "You are taking a little too much time on these smaller machines and your time on the big machines has been fairly good but on the smaller machines you haven't been making the time." And I says, "Well, that means that I haven't got the skill, Tommie." And he said, "No," he says, "you are just a little too slow." I says, "Well, that is it," and that was the end of it.

Q. Who was your shop steward?

A. Carl Schwartz.

Q. Did you ever speak with Schwartz about your discharge in his capacity as steward?

A. Yes, he came over the following morning and asked me, he says, "I hear you are being laid off." I told him, "Yes," I was. "Well," he says, "they can't do that. You have got seniority rights here." "Well," I says, "I don't know how far that will go around here." He says, "Well, I am going to look into it. I am going to see if I can't get ahold of"—what is that Labor Relations man's name?

Q. Mr. Goodenough?

A. Goodenough, that's it. So he said he had tried to get him on the phone a few times and he wasn't very successful and [292] towards evening, why, he came over and said, "I can't get ahold of him." I told him that was all right, "See what you can do about it," I said. "I am going to pull out."

(Testimony of John Marovich.)

Q. Do you know a Frank Gorham, Assistant Business Agent of 504? A. Yes, sir.

Q. Did you ever speak with Gorham about your discharge?

A. Yes, a couple of days later Frank called me up on the phone and asked me to come up to his office.

Q. Did you go?

A. Yes, I did. He invited me into his office there and we sat down——

Q. Was there anyone else present?

A. No, sir, not to my knowledge; just the two of us right there.

Q. And was there a conversation about this between you and Gorham?

A. Well, Frank says, "Johnnie," he says, "I don't know what we can do about this. We have gone as far as we can with it," and he says, "it doesn't seem like we can get anywheres and I don't think we can do a thing about it any more. If you want to fight the case," he says, "they have got this lottery charge to throw in against you." I said, "What lottery charge?" He said, "Running football pools and baseball pools." Well, I told him at that time I hadn't started no pools yet and I didn't see [293] what lottery charge they could hold against me.

Q. Well, did he tell you what the company's attitude was with respect to rehiring?

A. Yes, he told me.

Mr. Holmes: I object to that as calling for hearsay.

(Testimony of John Marovich.)

Trial Examiner Parkes: It is part of his conversation with Gorham. He may answer.

Mr. Holmes: It is still hearsay as to what the company's attitude was.

Trial Examiner Parkes: The objection is overruled.

A. (Continuing): He told me that—he says, "I don't think you will ever get back in, Johnnie, because both Mr. Buckingham and Mr. McAuliffe said they won't rehire you." I said, "Well, if that is the case we might as well just forget it."

Q. (By Mr. Bamford): Now, what is the process when you are discharged; are you given a termination slip, something of that sort?

A. Well, generally they give you twenty-four hours' notice and in that period of time, why—like I was given twenty-four hours' notice; then the following day close to quitting time, an hour or so, why, they gave me permission to check all my tools in, turn all my tool checks in. Then I was given my termination slip and taken to the Personnel Department and there I was given a slip to get my last checks that I had [294] coming there and then I came back to the shop and took my tools out to the guardhouse. [298]

* * *

Q. Did you know that Scheuermann was active in the Independent Westinghouse Workers Union? A. Yes, sir.

Q. Did he ever solicit you for membership in that union?

(Testimony of John Marovich.)

A. No, he didn't, but others did.

Q. Who were the others?

A. Why, oh, there was—well, Les was one of them, Ollis, and there was another fellow from below, Terry—I can't think of his name.

Q. Did you join the Independent Westinghouse Workers Union? A. No, sir, I never did.

Q. Did you remain a member in good standing of 504? A. Yes, sir.

Q. Do you know if the Independent Union distributed handbills, hand leaflets?

A. Yes, sir. By hand, at the gateways.

Q. Who did that?

A. Well, at times there was Clyde here and Les, and then they had some of the electrical workers, women electrical workers there, and men also from the Electrical Department. [297]

* * *

Q. Well, would you on occasion take a position contrary to that of Gorham and Scott?

Mr. Holmes: That is objected to as leading and suggestive. I should think counsel should be able to bring this out by having the witness testify to facts and not have counsel state the facts and ask the witness to agree with him.

Trial Examiner Parkes: Sustained.

Q. (By Mr. Bamford): Can you recall specific instances of your participation in discussion over these——

Mr. McGraw: Just a minute. Mr. Hearing Officer, I think, frankly, the entire line of ques-

(Testimony of John Marovich.)

tioning is going far afield. The fact remains that it doesn't make any difference what side he took in a Local argument. It doesn't go to any of the issues involved. The witness has testified he is still a member in good standing, indicating he was not disciplined or in any way acted against because of that, and counsel is purely on a fishing expedition for something that is immaterial, even if he finds it.

Trial Examiner Parkes: Well, I note the Complaint alleges that the witness and other employees Westinghouse discriminated against because they may have criticized the union. The objection is overruled. However, I will note your position.

Q. (By Mr. Bamford): Can you recall—well, I will repeat the question. [302]

Can you recall any specific meetings in which you participated in the discussion? [303]

* * *

Q. Did you pass out cards—excuse me.

When was that, if you remember?

A. Oh, that was around 1947, I think?

Q. Did you participate——

Trial Examiner Parkes: When in 1947?

The Witness: Well, I wouldn't know exactly, sir. I know—say, around, oh, I should judge around May or June, in there.

Trial Examiner Parkes: Very well. Go ahead, Mr. Bamford.

Q. (By Mr. Bamford): Did you pass out cards for the Steelworkers at that time?

(Testimony of John Marovich.)

A. I did, sir.

Q. Do you know if Clyde Scheuermann was expelled from the IAM?

Mr. McGraw: Just a minute. I object. That calls for a conclusion and opinion of the witness and it doesn't make and difference what his opinion is. We have all the facts in [305] evidence. Certainly this witness wouldn't possibly know about——

* * *

Q. (By Mr. Bamford): Do you know if Clyde Scheuermann was expelled by 504?

A. Yes, he was.

Q. How was he expelled, if you know?

A. At a meeting there, in our new Labor Temple, a meeting was held there and he was.

Q. Did you attend the meeting?

A. Yes, sir. There was a Board there that delved into Clyde and Les Ollis' case there and they read the decision of the Board before the membership and the membership voted on it and it was passed, where Clyde was fined and expelled from the organization, and the same with Ollis.

Q. How was this report presented? Was it presented at the meeting?

A. Yes, the chairman of the board that was in charge of the hearing there—I think his name was Henry Schmidt, at that time—he read it.

Q. Was he employed by Westinghouse at [306] the time? A. No, sir. [307]

* * *

(Testimony of John Marovich.)

Mr. Holmes: Is Mr. Bamford through?

Trial Examiner Parkes: Yes, I believe he was.

Mr. Holmes: Off the record a moment.

Trial Examiner Parkes: Off the record.

(Discussion off the record.)

Trial Examiner Parkes: On the record.

Mr. McGraw?

Cross-Examination

By Mr. McGraw:

Q. Mr. Marovich, you are now a member in good standing of Lodge 504, aren't you?

A. Yes, sir.

Q. Were charges ever preferred against [310] you? A. No, sir.

Q. Were you ever called before the Executive Board because of any of your activities in connection with the campaign of the Steelworkers to organize the plant in 1947? A. No, sir.

Q. Were you ever called before the Executive Board of the Lodge concerning any activities in behalf of the Independent Westinghouse Workers Union? A. No, sir.

Q. Were you ever interviewed by Mr. Scott with respect to any conduct of yours in connection with the Steelworkers' campaign? A. No, sir.

Q. Were you ever interviewed by Mr. Scott with respect to any activity on your part in connection with the Independent Westinghouse Workers Union? A. No, sir.

(Testimony of John Marovich.)

Q. If I asked you the same questions with respect to whether or not Mr. Gorham had ever asked or questioned you or discussed these same campaigns with you, would your answer be the same?

A. Yes, sir.

Q. It is a fact, isn't it, that during the most recent campaign for bargaining rights that nearly everyone in the shop discussed some phase of the pending campaign?

A. That is right, sir. [311]

Q. Now, going back to the date of your termination, did you report your unemployment to the union?

A. Yes, sir. I went the following day, sir.

Q. And that is—on the same day that you reported to the unemployment, the State Unemployment Office? A. Yes, sir.

Q. Did you fill out a form at that particular time? A. Where at, the state?

Q. At the union office?

A. At the union office, I think I did, because I was given this little card, this unemployed card that I had to take to the unemployment office every time and I had to register and report every week.

Q. Now, directing your attention to the period since your termination, did the union office ever call you with respect to employment at any other place since you left Westinghouse? A. Yes, sir.

Mr. Bamford: Objection, irrelevancy.

Trial Examiner Parkes: Overruled. You may answer.

(Testimony of John Marovich.)

The Witness: Yes, sir.

Q. (By Mr. McGraw): Can you tell us about when that was?

A. Oh, I should judge that was around the latter part of April.

Q. And do you know where the job was?

A. Yes. Mr. Gorham called me up, said "Johnnie, do you want [312] to go to work?" and I said right offhand, "Yes, sir." And he said, "I have a job for you at the San Jose Foundry." And I said, "That will be swell." I said, "When do you want me to report?" He said, "In the morning." I said, "All right, I will see you in the morning." I hung up and a few minutes later I called him back and said, "I can't make it, Frank. Give it to someone else."

Q. Now, at any time since April did the union call you with respect to employment any place?

Mr. Bamford: May I have a continuing exception to this line of questioning?

Trial Examiner Parkes: You may.

A. Yes, sir. When I went to pay my dues I seen Frank there at the office and he asked me, "Are you working, Johnnie? Are you ready to go to work?" and I told him I wasn't working and wouldn't be ready until about September sometime.

Q. (By Mr. McGraw): About when did this occur?

A. Oh, I imagine this occurred right—oh, around July.

(Testimony of John Marovich.)

Q. Of—— A. This year.

Q. 1950? A. Yes, sir.

Q. Did you ever have any kind of an argument with Mr. Gorham concerning any of your activities at the Westinghouse Plant at any time or [313] place? A. No, sir.

Q. Now, directing your attention to the time that Mr. Gorham called you into the office a few days after your discharge, who started that conversation?

A. Well, when we came into the office——

Q. Yes? A. I think Mr. Gorham did, sir.

Q. And what did he say?

A. He called me into the office and he said, "Sit down, Johnnie." And he said, "Johnnie, I don't think we can go any further on your case. We have gone as far as we can and I don't think we can do anything more for you."

Q. All right. Now, did he explain what had been done on your case?

A. He said he took it in and they said—they refused to even discuss it and that—let's see now —discuss it, and then he said that he didn't think I would ever get back there again.

Q. Did he tell you who he discussed it with?

A. No, sir. He did not tell me who he discussed it with.

Q. Did you file any kind of a grievance, did you fill out any papers or grievance blanks or anything like that? A. At that time—no, sir.

(Testimony of John Marovich.)

Q. Did you fill out a grievance at the time you were terminated? A. No, I didn't. [314]

A. No, I didn't. [314]

Q. And do you know whether or not a contract was in effect at that time? At the time of your termination? A. You mean with 504, sir?

Q. Yes. A. Yes, it was.

Q. You were aware, were you not, that a union shop election had been held?

A. Yes, in August of that year.

Q. Now, do you know whether or not other people were being laid off at about the same time that you were terminated? A. Yes, sir.

Q. I believe your testimony on direct examination was that if you were laid off in strict accordance with seniority, why you had no——

A. Objection to it, yes, sir.

Q. Did you ever discuss your termination with Carl Schwartz after you left the plant?

A. No, sir.

Q. And you have had no further contacts with him up until——

A. Right to the present time, right here, sir.

Q. Now, when did you first learn about these proceedings and your involvement in these proceedings?

A. Oh, last night or yesterday, sir.

Q. And how did you happen to learn about it?

A. Well, Mr. Danforth—is it, here—came over to my place [315] and told me that Les and Clyde here had filed their claims in and based on the evi-

(Testimony of John Marovich.)

dence and facts given, why, after he told me some of the facts in the case, why, I thought I should present my claims.

Q. Now, going back to the time that Mr. Ollis told you that you were going to be discharged, did you have frequent occasions to converse with Mr. Ollis before he told you that? A. No, sir.

Q. Did you know him?

A. No, sir—wait a minute. Who is that?

Q. Ollis.

A. Ollis—no, I have never seen Mr. Ollis here, oh, for months, until right now.

Mr. Bamford: I don't think he understands the question.

Mr. McGraw: Probably not.

Q. (By Mr. McGraw): I understood you to testify that on the—on Thursday of the week before you were laid off that Ollis came to you and told you to expect it? A. Yes, sir.

Q. Or something along that line. Now, just what did he tell you?

A. He says, "Johnnie," he says, "they have got us slated to go. You are going first, and then I and Clyde and they figure on one or two of the other boys."

Q. And did he tell you how he knew that? [316]

A. No, sir. He did not tell me.

Q. Did you ask him?

A. I asked him, yes. He said, "I got that from an individual," he says, "that is in the know, and he passed it on to me."

(Testimony of John Marovich.)

Q. Now, did you make any inquiries to Schwartz at that particular time about the pending layoff?

A. No, sir, I didn't.

Q. Did you complain to him?

A. No, I didn't, except the day I was—the evening I was laid off, and the following morning, when Mr. Schwartz came up, he said, "I understand you are being laid off." I said, "Yes, sir." He said, "I will see what I can do for you." He said, "You have a lot of seniority." And I said, "All right." He said, "I am going to see if I can't get ahold of Goodenough." Well, he tried to get Goodenough that day and, why, Mr. Goodenough wasn't around, evidently, and he told me he had no success and I said, "Well, do what you can and let me know what the outcome is."

Q. Had you told Mr. Schwartz that you had heard some time before that you were going to be laid off? A. No, sir, I did not.

Q. You did not mention that to him?

A. I did not mention that to Mr. Schwartz.

Q. Did you ever operate any pools, football pools? A. Yes, sir. [317]

Mr. Bamford: Objection, relevancy.

Trial Examiner Parkes: Overruled. There was some testimony on the direct, as I recall.

Q. (By Mr. McGraw): And had you ever observed any notices on the company bulletin boards forbidding the solicitation of pools?

A. Yes, sir, I have, prior to that.

Q. Did you ever come to the union and tell any

(Testimony of John Marovich.)

of the union officers that you were active for and in behalf of the United Steelworkers?

A. No, sir. I never did, sir.

Q. Did you ever tell any of the union officers that you were active on behalf of the Independent Westinghouse Workers? A. No, sir.

Q. Did you ever distribute any handbills for and on behalf of the Independent Westinghouse Workers? A. No, sir.

Q. Did you ever wear a button or any visual means of indicating your sympathy with the Independent Westinghouse Workers? A. No, sir.

Q. Isn't it a fact, Mr. Marovich, that you knew that most of the employees at Joshua Hendy had petitioned the Grand Lodge to transfer them to Local 504? A. No, sir, I didn't know that?

Q. Isn't it a fact that Mr. Scott told you that when he asked [318] you to cooperate and explained the setup of the District Lodge?

A. He did, sir, at that time, yes. He said I wasn't cooperating with him at that time.

Q. Now, isn't it a fact that he told you at that time that a majority of the people employed out there had requested transfer to Local 504?

A. No, sir, not to my knowledge.

Q. Would you say that he didn't tell you?

A. No, I would say he didn't tell me, yes, sir.

Q. Did you ever discuss with Mr. Ollis the contract that was executed after the union shop election in 1949?

(Testimony of John Marovich.)

A. I might have, sir, discussed the agreement, yes.

Q. And did you discuss it with Mr. Scheuermann?

A. Well, if we are going to get on that point, I discussed it with many of the boys over there, not only——

Q. Then is it your testimony, or—strike that.

Is it fair to say that you may have but you don't know of any specific instance in which you discussed it with him? A. That's right, sir.

Q. Didn't you discuss the matter of their reinstatement because of the union shop election and the contract that had been signed?

A. You mean back——

Q. Their reinstatement in Local 504? [319]

A. After their trial, sir?

Q. Yes. A. No, sir; I never did that.

Q. When was the first time you knew that Mr. Scheuermann had gone to the National Labor Relations Board and filed a Complaint or filed a Charge?

Mr. Bamford: Objection, relevancy.

Trial Examiner Parkes: Overruled.

A. It was the day that—I don't know whether you were there—Mr. Gorham or Mr. Scott had filed with the Board for an election at the plant. That is when Mr. Scheuermann and Ollis were up there, that day, filing for the Independent, at the same time. They let me know when they came back to work that night.

(Testimony of John Marovich.)

Q. (By Mr. McGraw): I think you misunderstood my question. I am speaking now about the charges that caused this hearing to take place. They are unfair labor practice charges. When was the first you knew about an unfair labor practice charge being filed by Mr. Scheuermann?

A. Well, I heard a few months back that he had filed a charge but I never paid—I didn't ask no specific date or time on it at all.

Mr. McGraw: That is all.

Q. (By Mr. Holmes): Do you know why he had filed a charge?

A. No, sir, but I could generally base it on some unfair labor [320] practice. [321]

* * *

Mr. Bamford: At this time I should like to offer in evidence as General Counsel's Exhibits next in order the Original First Amended Charges in this proceeding, which were filed September 9, 1950, and I shall request that the Reporter mark them as General Counsel's Exhibits next in order, 7 and 8, I believe.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 7 and 8 for identification.)

Mr. McGraw: Which is 7?

Mr. Bamford: 7 is 20-CA-328 and 8 is 20-CB-102. I would like the record to show that I have served Counsel in person with copies of these

Charges, and at this time I should like to offer GC-7 and 8 in evidence.

Mr. McGraw: And I object to their admission on the ground that the Trial Examiner has no right to accept a Charge.

Trial Examiner Parkes: Mr. Holmes?

Mr. Holmes: I am not objecting.

Trial Examiner Parkes: May I see the exhibits?

Mr. McGraw: In support of my objection, before you rule on it, I would like to give you one citation.

Trial Examiner Parkes: All right.

Mr. McGraw: And that is the Sewell Manufacturing Company, [334] 72 NLRB No. 19 in which the Motion to Amend the Charge at the hearing was denied, since the Board's Rules and Regulations do not provide for filing Charges with the Trial Examiner, and that is from a digest and index of decisions of the Board, published by the Board, covering Vols. 71 and 74. [335]

* * *

CHARLES V. PACHORIK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [338]

* * *

Cross-Examination

By Mr. Holmes:

Q. Did you ever hear any of the men in the group complain about Marovich letting his work go while he was wandering around the shop

(Testimony of Charles V. Pachorik.)

A. I don't recall.

Q. You don't recall any such complaint?

A. I don't.

Mr. Holmes: That is all.

Q. (By Mr. McGraw): Mr. Witness, are you a member of the IAM? A. I am.

Q. And how long have you been a member?

A. Since I started working here, when Joshua Henry had the plant.

Q. Were you a member of the IAM back East?

A. No, I wasn't?

Q. Now, did you become an officer of the Independent Westinghouse Workers Union?

A. No, sir.

Q. I believe you testified that you are still employed at Westinghouse? [369]

A. That's right.

Q. Have you ever been tried by a Trial Committee of Lodge 504 for any offense?

A. No, sir.

Q. Have you ever been called on to explain any conduct before the Executive Board of the Local?

A. I have not.

Q. Have you ever been criticized by Mr. Gorham personally for any of your actions?

A. No, I haven't.

Q. Did you ever have occasion to file a grievance with Mr. Schwartz?

A. No, I haven't. I don't believe I have.

Q. Well, it is a fact, isn't it, that you and Mr. Schwartz liked to argue with each other?

(Testimony of Charles V. Pachorik.)

A. Not only Mr. Schwartz and I; that was general in the shop. That is typical in a machine shop.

Q. You argued with him about different subjects?

A. Well, I wouldn't say argued. I'd say just talked about things.

Q. And did Mr. Schwartz ever tell you that he was going to get your job because of your opinions about this Independent Westinghouse Workers Union? A. No, he didn't tell me.

Q. And in fact, within a few days after the election it kind [370] of became a forgotten issue, didn't it? A. What do you mean by "it"?

Mr. McGraw: Well, would you read the question back, please.

(Question read.)

Mr. McGraw: I will reframe the question. Perhaps you didn't understand it.

Q. (By Mr. McGraw): Isn't it true that a few days after the election people just forgot about the complaints and the contests they had had before the vote was taken?

A. You say a few days? Well, there was still talk. Fellows——

Q. Well, progressively you talked less about it?

A. Oh, yes. That's right.

Q. And so now, until just in the last week or two, it has probably been months since anyone has discussed it? A. That's right.

(Testimony of Charles V. Pachorik.)

Q. Did you ever go to the Personnel Office to determine what your seniority standing was?

A. I believe I mentioned it to Mr. Kelly at the time I was notified of my termination, and when I left his office I was under the opinion that my seniority was good as of 1924.

Q. And you know for a fact that some people who were working at Joshua Hendy when you came to work there were laid off before you were considered for a layoff, don't you? [371]

A. No, I don't know that. [372]

* * *

FLOYD KING

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [373]

Direct Examination

By Mr. Bamford: [374]

* * *

Mr. McGraw: It also appears the General Counsel is trying to develop a theory that any time a union representative disagrees with a member, no matter on what occasion or what ground, it is an unfair labor practice and it demonstrates bias and hatred and prejudice. [379]

* * *

(Testimony of Floyd King.)

Q. Were you present at the union meeting when Clyde Scheuermann was fined and expelled?

A. Yes, I was.

Q. Who presented the charges brought against him, or is that a correct statement? How did—I realize I may have inadvertently made a mistake on that. Will you please strike that. I will withdraw the question and ask you this:

How was his name brought before the meeting?

Mr. McGraw: I object, Mr. Trial Examiner. It doesn't make any difference how it was brought. We will stipulate that it was brought in strict accordance with our Constitution and Bylaws.

Trial Examiner Parkes: I assume it is a preliminary question. The objection is overruled.

Q. (By Mr. Bamford): How was his name brought before the meeting, Mr. King?

A. Henry Smith was the one who reported the findings of the [391] committee.

Q. And what were those findings? Were they presented orally? A. Yes.

Q. And what were the findings?

A. The findings were that Clyde Scheuermann and Les Ollis were found to be guilty of conduct unbecoming a member and dual unionism. They were fined $500 apiece and expelled from the union.

* * *

(Testimony of Floyd King.)

Cross-Examination

By Mr. Holmes: [392]

* * *

Q. And you just differed with the interpretation for the application of the contract, isn't that right?

A. I was going by what the contract said.

Q. Well, at least, what you thought it said?

A. No, what it did say.

Mr. Holmes: That is all.

Q. (By Mr. McGraw): Mr. King, are you still a member of 504? A. That's right.

Q. Have you ever been tried by a Lodge for any misconduct? A. No.

Q. Have you ever been called before the Executive Board to explain any conduct of any kind?

A. No.

Q. Have you frequently attended meetings of the Lodge? A. Yes.

Q. Did you attend the meeting of the Lodge at which it discussed and acted on the contract which is now in effect? [399]

A. Do you mean the meeting where the contract was approved by the membership?

Q. Yes. A. Yes, I was.

Q. And did you receive a written notice of that meeting advising you when the meeting would take place and where? A. Yes.

Q. And in fact, all the members of the Lodge received such? A. No.

Q. Well, can you tell us who received it and who didn't?

(Testimony of Floyd King.)

A. I can't remember exactly but I can remember that there were four or five who did not receive a card.

Q. And it was common knowledge in the plant as to when the meeting would take place and what the purpose of the meeting was?

A. Well, it was posted on the bulletin board, as I remember. [400]

* * *

Recross-Examination

By Mr. McGraw:

Q. Isn't it a fact that in the positions that you took on the different matters that came before the Executive Board that you consistently took the position that you thought was right on each question?

A. That I thought was right?

Q. Yes, and isn't it true that sometimes that was in agreement with Mr. Gorham's position?

A. That's right.

Q. And sometimes in disagreement?

A. That's right. [404]

Q. And the same would be true of all of the other members of the Executive Board, wouldn't it, to the best of your knowledge?

A. Well, some of them never even showed up, so they couldn't take a position.

Q. But of those that were there and participated, so far as you know, they invariably took the position that they thought was right on each question?

A. I couldn't say because I was only judging for myself.

(Testimony of Floyd King.)

Q. Now, isn't it a fact that the business agents are part of the Executive Board?

A. I couldn't be specific.

Q. Well, they participated and they voted, didn't they? A. They participated.

Q. Do you know whether or not they voted in the decisions of the Executive Board? Did they cast a ballot? A. I don't think they did.

Q. Do you know whether or not the sentinel was a member of the Executive Board?

A. Yes, he was.

Q. And the conductor? A. Yes.

Mr. Holmes: These are words of art that I don't understand. It takes me back to my college days, though.

Q. (By Mr. McGraw): Now, can you tell us whether or not the members of the Executive Board were considered to be officers [405] of the Local?

A. By who?

Q. Well, first, by you? Do you know whether or not they were considered to be officers of the Lodge?

A. They were never spoken of as such.

Q. Do you know what the provisions of the By-laws of the Lodge were with respect to whether or not they were to be considered as officers of the Lodge? A. I don't believe they are.

Q. And is a steward considered to be an officer of the Lodge? A. No. [406]

* * *

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock, p.m.)

Trial Examiner Parkes: The hearing will be in order.

It doesn't make any difference to me which one of you gentlemen would like to put your case first.

Mr. Holmes: Before anybody puts on a case, I want to move to dismiss the complaint in its entirety and, in the alternative, to move to dismiss the complaint insofar as it pertains to John Marovich; and I think in that connection, those sections are: part 1 of paragraph 3, part 1 of paragraph 4, part 1 of paragraph 5, and the mention of John Marovich in paragraph 6, and in paragraph 7, and again in the alternative, the language so far as it relates to Scheuermann. The grounds for the motion are as follows: One, that the amended consolidated Complaint is based upon a first amended charge which was filed either today or yesterday, at least in the last few days, which charge differed from the first charge in that it referred to an alleged unfair labor practice against John Marovich. The charge was not timely filed and no complaint may be based upon the reason that it was not filed within six months after the acts complained of.

The filing of the first amended charge was obviously an attempt to revive the cause of action in favor of Mr. Marovich against the Company which was outlawed and it was past the [410] Statute of

Limitations set out in 10(b), and that the filing of such a charge was in reality an attempt by the Ccunsel, for the General Counsel, to circumvent the provisions of Section 10(b) and to thwart the purpose of the Act.

The complaint based upon such a charge should be dismissed because no complaint can be issued unless a charge is filed within six months after the act complained of. The matters relating to Marovich are new and different from those relating to Scheuermann. They are not germane to the case involving Scheuermann; those charges alleged in the Complaint pertaining to Marovich are completely independent. The case might be different if the discharge of Marovich and the discharge of Scheuermann complained of were so closely related that they could be considered the same act, but that is not the case here. There are two completely different acts, and the attempt to run them in together is unlawful and improper and the Complaint should be dismissed on that basis. Certainly, the portion of the Complaint relating to Marovich should be dismissed on that basis.

The motion is further based upon the ground that the Complaint is not supported by substantial evidence.

I am going to discuss briefly, the testimony of the witnesses which have been brought here by the General Counsel. Mr. Scheuermann testified that he had been employed at Westinghouse since Westinghouse took over the plant, employed there [411] by the predecessor of the plant, that he had been a mem-

ber of the I.A.M. That in the spring of 1949, he and some others organized a union called the Independent Westinghouse Workers Union and that he became the president of the union and directed its affairs. He took leave of absence from Westinghouse to direct the affairs of that union and to direct the organizational campaign. He also testified that he was expelled from Local 504 at about that time. He did not testify and nobody else testified that he, or anybody else, gave any notice of the fact that the Company knew, by reason of semi-official notice, knowledge of the fact that Scheuermann was not at all times a member of the I.A.M.

Mr. Scheuermann returned to work, he testified, after this organizational campaign and after this election. He remained at work, I think he said he returned to work about July 10, said it was the month of the election which was held about July 7, as I recall, continued to work there from early in July until early in November. No one asked him any questions, that is, as far as the Company was concerned, no one asked him for the Company whether or not he was a member of the union or was recognized by the union membership and he didn't tell anybody who had authority to receive the information for the Company that he was not a member of the I.A.M., or that he had been expelled from the I.A.M., or anything else about his relationship with the I.A.M.

Mr. Scheuermann testified that during this period he knew, and that it was common knowledge about the plant, that the I.A.M. was negotiating a con-

tract with the Company. That among other things the I.A.M. was seeking a union shop. He stated that he knew there was a union shop election in the plant; he said he did not vote, but he knew the day on which the voting took place and he also knew the results of the voting, that the union was entitled to enter union shop contract. He denied that he knew when the contract was actually signed or that he had seen a copy of the contract, but he did admit that it was general knowledge about the plant that you had to belong to the union to work there, that he knew that people were talking about those who did not belong to the union, but he did not state that speech by anybody for the Company in any type of supervisory capacity, knew or talked to him about his lack of membership in the I.A.M. or his relationship to the I.A.M. in any way.

Now, in that situation where Mr. Scheuermann, a man of eight or nine years experience in unions, including experience as an union official directing an organizational campaign, a man with full knowledge of the fact that the Company was negotiating a contract with the I.A.M. in a plant where there had been a union shop for eight years, and completely after, or including the time when union shop contract was held, a man with that knowledge took no steps to find out his status under the new contract which he knew would be negotiated. He made no effort to talk to any supervisor or Mr. Goodenough, the Industrial Relations Manager, or anybody else to find out what he had to do and what his status would be. He simply assumed that the

Taft-Hartley Law would protect him. As he put it, he assumed the union shop contract would have no effect on him because of the Taft-Hartley Law, and he is presumed to know as a mature, intelligent citizen, and certainly as an experienced union member and official, he is presumed to know the requirements under that law, to-wit: That he must tender to the union having lawful shop contract the initiation fees and dues normally required of everybody else.

Now, whether or not he had that knowledge subjectively, is beside the point. He is presumed to have the knowledge because he was suffering no disability at that time, so he is presumed to know that he had to pay his dues and his initiation fees, and he knew, or had good reason to know, that there was a union shop contract. Now, even if he did not have actual knowledge that the contract had been signed, he is a reasonable man, he is presumed to be, and certainly his experience in union affairs placed him under the obligation to make an inquiry to find out just what his status was. There is nothing in the law that requires that the company specifically advise individual employees that as of a certain day they must begin paying union dues or that they must tender [415] their initiation fees, there is no such obligation imposed by the law, but there was an obligation on Mr. Scheuermann to make inquiry because he had plenty of knowledge that the union shop contract either had been signed, or was about to be signed. But instead of doing what a reasonable man would have done, Mr. Scheu-

ermann pretended to be ignorant of the situation and he thought he would let matters ride along without doing anything about it, and on the 32nd day after the contract was signed, he was suddenly faced with the situation where the union had demanded his discharge and he had not made any effort to tender initiation fees or dues.

Now, if it is argued that there was a tender of dues by Mr. Ollis during the period during the 30 day period after the contract was signed, and that such tender was made in Mr. Scheuermann's presence, that again is beside the point because it was not a proper tender. If it is argued that no tender was necessary because Mr. Ollis' dues, with respect to the union, were rejected, we point out that the offer was not made on behalf of Scheuermann and that it was not a proper tender because it was a tender of only dues and not of dues and initiation fees which the law requires. So there was no tender, no attempt by Scheuermann or by Ollis on his behalf to comply with the requirements of the law.

When Mr. Scheuermann learned that he was discharged, he wanted to do something about it, which is a reasonable thing [415] but it was too late and any tender that he might have made after he was discharged has nothing to do with this case. A tender after the discharge was accomplished is not a good tender and if in effect he did attempt to offer his dues and initiation fees either to Mr. Dormann or to Mr. Scott in his visits to the union office, it was then too late, he was discharged. He would have to obtain new employment and he could not

seek employment as a new employee. He was trying to remedy something which was irremediable, he had been discharged, he had failed in his obligation under the law and the one way he could remedy it would be for the union to voluntarily waive the requirement. If it didn't do so, that is a matter of his own concern. There was nothing under the Act which required it to waive the requirements imposed by Section 8(b)3, rather, Section 8(a)3.

Now, the next witness, Mr. Ollis, also knew of the union shop. He knew what it meant. He knew about a union shop contract; he worked under them and he knew that about a union shop contract at the Westinghouse plant when he made his dues tender, if indeed, he did make one. Mr. Ollis knew there was a union shop in the plant, that he had to belong to the union in order to retain the job. He testified that in the presence of Mr. Scheuermann, he did make an offer of his dues.

Assuming that to be the truth, it was still only an offer of dues and not an offer of inititation fees and dues which [416] the law requires.

Furthermore, Mr. Ollis testified that he made that tender after severe prodding. Somebody had irritated him and made him mad because they called him a free rider, or something of the sort, and he said they were kidding him at that time. So, it is not at all clear from the testimony whether he made the offer in good faith, or whether he was just kidding.

So, the testimony of Mr. Ollis does not add very much to what Mr. Scheuermann had to say except

to verify to these two men as well as the remainder of the plant that the contract had gone into effect pursuant to the two elections, and that it was necessary to be a member of the union in order to work in the plant. It was well known by both of them, as well as by everybody else, and yet, no attempt was made by either to make a proper offer of dues and initiation fees with—on his own behalf or behalf of others on behalf of both of them.

The next witness, a Mrs. Chloe Andersen, testified that she listened in on a conversation between Mr. Gorham, union business agent, and certain supervisors. And that in the course of that conversation, Mr. Gorham said, "Now that the contract is pretty well buttoned up, I want you to get rid of certain men." And she said that he listed four men. She said that Mr. Gorham left the meeting shortly thereafter and that Goodenough who was among those present stated that Mr. Gorham had been a good boy about signing the contract and the [417] least they could do to comply with his wishes about getting rid of individuals.

Well now, that testimony is inherently improbable because the contract was more than a month away from signing at that time, and it was well known to the employees in the plant. As a matter of fact, one of the latter witnesses, Mr. King, testified here this morning that there was a notice on the bulletin board of the union meeting to ratify the contract in early October. So the testimony of Mrs. Andersen is just inherently improbable that anything had been promised to Mr. Gorham because

the contract was more than a month away from signing. But if such a conversation took place, she herself later testified to the effect that they discussed the four individuals, does not amount to a determination at that time by the Company that they were going to discharge anybody pursuant to the union's request.

All she said was that they talked about these four individuals and that they mentioned that Mr. Marovich was not a competent worker and that somebody asked what dissatisfaction they had had. Her testimony does not relate to any reasonable excuse for discharging either individual, that somebody simply mentioned those names. She further testified that Mr. Scheuermann was barely mentioned in the conversation.

The later testimony developed by the General Counsel's witness shows that the two individuals that Mrs. Andersen [418] testified were to be discharged are still working for the Company, and one of them received a promotion and got a pay raise at 14 cents an hour.

The testimony of Mrs. Andersen does not show that the Company had any knowledge of any grievance, or dissatisfaction, or grudge that the I.A.M. may have had against these four individuals. Her testimony does not prove in any respect that the Company knew that these employees had expressed opposition to the administration of this union, or that the Company knew that these individuals had expressed a preference for the I.W.W. Union, or that the Company knew that these individuals had

criticized Local 504. There was nothing in her testimony which indicated that the Company had any knowledge of what the union had against these four men, if they had anything against them.

Her testimony does not show that the union did not have some justifiable reason under the law to ask for the discharge of these people, but above all it is clear from the testimony here, that there was no contract in force at that time when Mrs. Andersen complained this meeting took place. It is clear from the evidence adduced here that the contract had expired prior to the election and that there wasn't any contract in force by which the union could ask for the discharge of these individuals on any basis.

With respect to the individuals King and Pachorik, Mrs. [419] Andersen's testimony was limited to a couple of questions asked by a couple of people in this meeting, about what there was wrong with King or Pachorik. There is nothing in her testimony which indicates any dissatisfaction by the Company with these two individuals, or any decision by any supervisor of the Company to get rid of them on any grounds.

All of Mrs. Andersen's testimony on cross examination showed that she had very little, if anything, to do with many of the individuals whom she asserts were in this meeting. She stated that a Mr. Culbertson was in the meeting, but on cross-examination she stated that on at least two occasions while the meeting was going on, she left her room and her desk to go over to Mr. Culbertson's room to

talk to him and on direct she testified that he was in the meeting. She stated that was the reason she passed by the door a couple of times to look in and see who was there. Yet, the testimony in her cross and direct examination are absolutely contradictory.

Now, with respect to the testimony of Mr. Pachorik, it is clear that Mr. Pachorik is still employed by the Company in the same job that he has been in for four years. He was employed, of course, by Hendy prior to his employment by Westinghouse, but during his time with Westinghouse, he has been employed on the same job. He testified that he was told by Mr. Shields that he was going to be terminated, but, as well as [420] the day can be determined, it appears to be two or three months after this meeting that Mrs. Andersen testified to.

And further, it appeared that the question of Mr. Pachorik's termination came up at that time when a great many individuals were laid off for lack of work. So there is nothing in the testimony of Mr. Pachorik to substantiate any of the allegations of this Complaint or nothing in his testimony to show that the Company even considered his discharge, or that Mr. Shields talked to him about a possible termination. For any of the reasons alleged in the Complaint, there is nothing to indicate that the Company had any knowledge that Mr. Pachorik had expressed any opposition to the administration of the union, or that he had expressed a preference for the I.W.W. Union, that he had criticized this union in any respect.

None of those things has been related to the Company in any way. Mr. Pachorik didn't even tell the

Company about his talks with Mr. Shields, Mr. Buckingham, or Mr. Kelly at the time they mentioned his possible termination, so there is nothing in his testimony whatsoever, to relate to the Company by way of actual knowledge or notice by him telling them.

So even accepting Mr. Pachorik's testimony as entirely true, there is nothing in it which would support the allegations of the Complaint. Whether or not he discussed the matter or argued with Mr. Schwartz, the union's shop steward, is completely immaterial so far as the case against the Company [421] is concerned, because there is no proof that the Company had knowledge of any of those things.

And the same might be said of Mr. King, except in one respect. Mr. King did bring the issue of his vacation, according to his testimony, to the attention of Mr. Goodenough, but that doesn't prove anything. It simply proves that the union and the Company agreed to the interpretation of the contract in the commutations of vacations, but everybody else but Mr. King liked the idea, so he complained. It does show his difference of opinion with the union; other than that, it has nothing to do with this case. It was simply that he felt he should receive more vacation than he actually got. There was no criticism of the union implied there. The union agreed with the Company's interpretation of the contract and acceded it.

There was one other thing that is in Mr. King's testimony that I think is quite important here, and

that is that typed copies of the contract were in the possession of the stewards after the first contract had been negotiated. I think the testimony here and the General Counsel's case showed that typed copies also were in the hands of stewards after the current contract was negotiated. So it shows a consistency in the practice there that there was no attempt to hide anything about the contract. It was simply the usual customary manner of doing things.

Mr. King also testified that there were many individuals [422] who were critical of the union in many respects and that there were many individuals still in the union who are critical of it and are sympathetic to the old Lodge 68, which was the predecessor of Local 504.

We cannot assume an unfair labor practice on the basis of differences of opinion, nor misunderstanding within the union. Those are to be expected in normal human relationships. The fact that there were differences of opinions between some of these individuals and one and another of the union has nothing to do with the case because there is not proved by this evidence to be within the knowledge of the Company and therefore, there can not be evidence to support an unfair labor practice finding against the Company.

Mr. Marovich was a witness also. It was shown in the testimony that Mr. Marovich was laid off during a period when a great many employees were laid off for lack of work. Mr. Marovich apparently felt he was laid off improperly. I don't know whether he said it was out of seniority or not, but

he felt it improper to lay him off despite the fact they were laying off hundreds of other employees. But it is not shown here that Mr. Marovich was laid off for any reason which might be an unfair labor practice. It is not shown that there was any intention or any motivation of the Company in his termination or layoff having to do with the violation of the Act asserted in the Complaint. There is nothing showing that the [423] Company intended or was motivated by a desire to discriminate against Mr. Marovich in any way.

It is true that his termination or layoff occurred eleven days after the conversation with—which Mrs. Andersen asserted she heard, but that coincidence in time does not prove anything because there is no evidence other than that flimsy coincidence.

To connect in any way the termination of Mr. Marovich with any activity of the union and the mere coincidence of time is insufficient proof of the allegations contained in the Complaint, for there is no proof that the Company knew that Mr. Marovich had expressed opposition to the administration of the union or had expressed a preferral to the I.W.W. union, or had criticized the union.

On the other hand, it was shown in this testimony that Mr. Marovich had a reputation for running around the plant selling lottery tickets. His activities in 1944 or in 1946 are completely immaterial to this case for they occurred prior to the time Westinghouse took over this plant and there is no proof that Westinghouse had any knowledge of what he had done or his relation to the union on those dates.

There is no proof whatsoever, except for this alleged conversation that Mrs. Andersen said she overheard, that the union at that time requested that Mr. Marovich be laid off, or disciplined, or discharged, or anything of the type. Even on the General Counsel's case, it is clear Mr. Marovich was [424] laid off for cause during a period when a great many people were laid off, and that alone is not sufficient to support an unfair labor charge.

Now, with respect to Mr. Scheuermann, the evidence does show that a request was made by the union to discharge Mr. Scheuermann.

In the letters in evidence, there is no such formal request shown for the discharge of Mr. Marovich. I think that the distinction between the two is quite pertinent, but Mr. Scheuermann's case, of course, is quite different from the case of Mr. Marovich, for Mr. Scheuermann admittedly was discharged pursuant to the union shop contract and had made no attempt to comply with the requirements of that contract and requirements of the law.

I think that completes my motion, or rather, my argument in support of my motion or motions.

Mr. McGraw: I, of course, have some motions to dismiss, Mr. Trial Examiner.

Trial Examiner Parkes: All right.

Mr. McGraw: Respondent Union moves to dismiss the Complaint in its entirety, or as an alternate, the Complaint against the union and further alternate, the Complaints against the individuals involved, namely, Floyd King, Charles Pachorik, Marovich, and Scheuermann. And that it is our

intent that the motion be so interpreted that each might be severed from [425] the other because of their independent reference to these individuals in the Complaint.

Our grounds in support of the several motions to dismiss are, briefly: One, because the Amended Complaint brought in new matter that has not and can not be related to the original charge; two, that the Complaint when it was amended was unsupported by a proper and legal charge; three, that the first amended charges introduced were illegally accepted by the regional director because of the express provisions of the law; four, General Counsel has not proved his original case; and five, that General Counsel has not proved any of the supposedly derivative cases that have been introduced here as it brought in an entirely new set of facts.

Now, I think frankly, that any argument concerning motions to dismiss needs to start with the recognition of the fact that we do have two entirely different sets of facts to consider.

One deals, and that is the Original Charge and Complaint, with the termination of Scheuermann, and the other is, more or less, a spider web which grows out of the testimony of the lady at the key hall, and the particular spider web has not been related in any particular way to the first instance.

Now, it is quite clear from the Act, it is both in Section 8(a)3 and also in the language used in 8(b)2, that there is some obligation to tender the periodic dues and initiation [426] fees uniformly required as a condition of acquiring or retaining

membership. And so General Counsel had the burden of proof to show that such tender was made and he has failed miserably in doing this.

Two, that he had a duty to show that this tender, if made, was made at a reasonable and proper time. Now certainly, it would be an improper time if it occurred before the union had been authorized by the result of an election, to negotiate a union shop agreement and the record is crystal clear that no such offer was made prior to the election involving the union shop on August 25, 1949, when it became common knowledge tht the union had won this union authority election. That would be the very earliest that any offer or tender would be proper and would have any bearing on Counsel's case. It still, however, wouldn't be, shall we say, legally correct and complete until September 7, the day of the certification, and yet the facts are that there is no evidence to show that any offer of tender was made at that time.

Then we have the period of time between the date of certification, September 7, 1949, and the date of the termination of Mr. Scheuermann. Mr. Scheuermann's own testimony conclusively shows that no tender was made of any kind to anybody during the critical period involved, and in fact, the only thing that might constitute an offer or tender on the part of Mr. Scheuermann occurred after he had gone to the National [427] Labor Relations Board and that they advised him he better make a tender, and went back to the union office on or about November 14, to make such a tender. So it

appears thus far that the General Counsel's case depends essentially, so far as represents to Scheuermann, on events after he had been terminated.

Now, concerning these other persons, Pachorik, King, and Marovich, we have lots of material here relevant, but all of it is heresay and none of it goes to prove that, one, the union in the first instance asked for the discharge or, two, that they were entitled to do so, and certainly, it was demonstrated that even if the union had asked for the discharge, that the Company didn't agree with it and they didn't discharge any of the people involved at that time for the reasons alleged by General Counsel.

In fact, they continued the employment of Scheuermann beyond that date. In fact, they continued the employment of Marovich beyond that date. The General Counsel has failed to prove that any person at any time was terminated because of his hostility towards, or his activity on behalf of any labor organization. It might be assumed, of course, Scheuermann was terminated at the request of the union. We have, certainly, written letters in evidence, and that is the only one that shows any connection at all between the Company's action and the union's request. It still remains to be shown as to what extent the union's request actually had to do with the termination [428] of Scheuermann, assuming that that was the reason that Scheuermann was terminated; we come up against the fact that there is no evidence to show that Scheuermann carried out his responsibilities.

I think, frankly, the charge as reflects, too, on

Floyd King and Pachorik are ridiculous and I think it is rather a tragedy on justice that they were even brought in and we have wasted time discussing it.

I think the Trial Examiner is well aware of the merits as to the value of the evidence offered and that certainly, the very fact that these people were continued in their employment disproves any allegations or insinuations, or conclusions that the General Counsel would like to draw from this spider web that began with part of a conversation supposedly overheard in the course of business. I don't believe we need to belabor the point. I think the facts are quite clear and that without rgards to the right or wrong, shall we say, concerning amendments to the Complaint and charges, the bald fact is that General Counsel has not proven any of his charges and so the case should be dismissed. [429]

* * *

B. H. GOODENOUGH

resumed the stand and was examined and testified further as follows:

Direct Examination

By Mr. Holmes:

* * *

Q. When did Westinghouse take over the plant from the Hendy Iron Works?

A. March 1st, 1947.

Q. Do you know when the collective bargaining agreement was in effect after that date?

(Testimony of B. H. Goodenough.)

A. I believe the date of the contract which was in effect when [441] I came to the coast was May 5th, but I'm not sure of that date, 1947.

Q. Was that contract in effect when you came to the plant? A. It was.

Q. How long did it remain in effect?

A. It remained in effect until it was terminated on March 31, 1949.

Q. Is that the only contract between the date of May, 1947 and March, 1949?

A. With I.A.M., yes.

* * *

Q. Do you know whether that contract contained a closed shop provision? A. It did.

Q. Was that closed shop provision applied by the Company during the length of that contract?

A. All employees hired under the jurisdiction of the I.A.M. understood that provision before they were employed. [442]

Q. Were they required to remain members in that union during their employment with Westinghouse? A. They were.

Q. You said the contract expired on March 31, 1949? A. That is correct.

Q. What terms and conditions were maintained in effect after that date and prior to October 10, 1949?

A. In general, the provisions of wages, hours, and working conditions were continued after the termination until the contract was signed.

(Testimony of B. H. Goodenough.)

Q. Were there any provisions of that expired contract which were not maintained in force and effect during the period from March 31, to October 10? A. There were.

Q. What provisions were they?

A. The closed shop provision was not applied from the termination date, nor was the provision in the contract which called for compulsory arbitration.

Q. Were all other provisions applied to the Company?

A. To all intents and purposes, yes.

Q. Do you recall that a representation election was held in the plant July of 1949? A. I do.

Q. And that the results were certified shortly after the election? [443] A. I could.

Q. After those results were certified, did you again have negotiations of a new contract with the union which were certified? A. We did.

Q. Which unions were certified?

A. The I.A.M., the I.B.E.W., and the Teamsters.

Q. During what period did you negotiate with the I.A.M.?

A. If I recall correctly, we started negotiations in the first week in August; certification was issued, I believe, the 19th of July, and we continued negotiations with all three unions up to and including, I believe, the last week in September. We met three times a week almost regularly with each of the three unions.

(Testimony of B. H. Goodenough.)

Q. That is, each individually, or all three together?

A. The majority of times they were separate meetings, but there were several occasions during the month of September in particular. There were certain paragraphs or clauses in the contract which management wanted to be uniform in all three of the contracts and, at that time, we had joint meetings with the Teamsters, the I.B.E.W., and the I.A.M. represented.

Q. You say regular meetings, what do you mean by that?

A. Yes, we had a regular schedule of meetings, two meetings each week, two hours at each meeting for each of the unions.

Q. You were meeting both in the morning and in the afternoon? [444]

A. Morning and afternoon.

Q. Was a contract eventually agreed on?

A. It was.

Q. Will you state the date?

A. The contract was signed on October 10, 1949.

Q. Signed by whom?

A. The contract was signed by each of the unions. There was a contract signed with the I.A.M. on that date, with the I.B.E.W. on that date, and with the Teamsters on that date. [445]

* * *

Q. Now, Mr. Goodenough, during the course of the negotiations, was agreement reached on different

(Testimony of B. H. Goodenough.)

sections of this contract at different times or was the entire contract agreed to at one time, that is, agreement reached on the entire document at one time?

A. Tentative agreement was reached on certain paragraphs as we went through our negotiations from July 19 to the latter part of September with an multiple understanding between both parties, that any tentative agreement to any said clause and paragraph might be rephrased in consistency with other clauses that might be related.

Q. I will direct your attention to Section 2, which appears on Page 2 of the document and ask you the approximate date which the agreement or tentative agreement was reached on that section?

A. I am sure that it was in the last two weeks of the negotiations. It was one of the last items set up.

Q. Was it subsequent to the certification by the National Labor Relations Board of the I.A.M. as being eligible to enter a union shop contract?

A. Most definitely.

Q. About how long after such certification? I think that is identified in the record as September 7. [451]

A. It was at least two weeks after September 7, before we reached agreement because I remember detailed discussions in regard to that clause. We could not reach agreement as to the phraseology.

Q. When was the final agreement reached with

(Testimony of B. H. Goodenough.)

the I.A.M. on the entire document subject to ratification by the union?

A. I am not sure of the date, Mr. Holmes, but I think that it was around September 25 or 26.

Q. After agreement had been reached on this contract, were any steps taken to acquaint the supervisory staff at the plant with the contract?

A. There were.

Q. What steps were taken in that regard?

A. Mr. Everette, who was my assistant, sat with me on all negotiations with the three unions and I divided the supervisors into two groups and we held a training course with those supervisors and reviewed every paragraph in the contract with them.

Q. Can you state the approximate dates of these training courses?

A. The contract was signed on the tenth and I think they started on the following Monday, the beginning of the following week.

Q. How many classes were there?

A. Each of us held three sessions with our respective groups [452] of supervisors.

Q. How many sessions did a particular supervisor attend?

A. Each supervisor attended three sessions.

Q. Were the supervisors furnished with the copies of the agreement? A. They were.

Q. What kind of copies were they?

A. Hectograph copies.

(Testimony of B. H. Goodenough.)

Q. When was it in booklet form, actually received from the printer by you?

A. I don't remember the date.

Q. Well, did you have it immediately after the contract was signed?

A. Well, I would say it was several weeks after the contract was signed.

Q. In the meantime, what copies did you use?

A. We used the hectographed copies.

Q. What supervisors had them, not by name, but by classification?

A. All supervisors in the plant.

Q. And that included what titles?

A. Well, that included everything from the rank of assistant foreman up to the manager of the establishment.

Q. Are assistant foremen with the margin?

A. They are not. [453]

Q. Do you know whether any shop steward had copies of the contract?

A. I furnished to the union enough copies for distribution to all stewards. [454]

* * *

A. The maximum hourly paid employees that we had was 1,956.

Q. When was that maximum reached?

A. That was reached in the middle of March, 1949.

Q. How many employees were there at the time of the representation election?

A. I would say 1,400.

(Testimony of B. H. Goodenough.)

Q. From that date in July when the representation election was held until the end of 1949, did the total of employees increase or decrease?

A. Decreased, appreciably.

Q. To about how many?

A. We went to a low on our hourly roll of 872 employees. That is more than a thousand below our maximum.

Q. When was the low point reached?

A. We got in the low point in the middle of December, I believe, and stayed there for the next two months, three months before we started picking up again.

Q. You started to pick up about when?

A. February or March.

Q. February, 1950? A. That is right.

Q. During the time that the total employment was diminishing, were workers laid off from all departments or from particular departments?

A. From all departments. [455]

Q. Layoffs were general, then, in the plant?

A. Correct.

Q. During the period that there was no contract in force with a union, how was the layoff determined?

A. We had, as previously stated, indicated that we would maintain the wages, hours, and working conditions which were in effect when the contract was terminated. We followed the old seniority provision of the contract.

Q. Was it a straight seniority provision?

(Testimony of B. H. Goodenough.)

A. Seniority and ability.

Q. And how did you apply that?

A. Well, during the early part of the layoff, we followed pretty closely strict seniority. As it got down to a minimum number of employees, we gave a great deal more attention to the employee's ability to do the job as compared to other employees on the roll. And in the last two or three months of the layoff, considerable attention was focused on relative abilities of employees as well as their seniority.

Q. Did you lay off employees with more seniority in order to retain employees with less seniority who you considered to have more ability?

A. We did.

Q. In more than one case?

A. Several cases in all of the unions.

Q. You say all of the unions, by that it would be understood [456] you were referring to the I.B.E.W. unit, the Teamsters unit, and so on?

A. That is right.

Q. I will show you a letter that is in evidence as General Counsel's Exhibit No. 6 and ask you when you first saw it?

A. On November 11, 1949.

Q. Where did you first see it?

A. In my office.

Q. How did you receive it?

A. Mr. Gorham handed it to me in an envelope.

Q. What was Mr. Gorham in your office for, do you recall?

A. He was there with Mr. Schwartz, the chief steward, to discuss a grievance.

(Testimony of B. H. Goodenough.)

Q. Did you discuss the grievance?

A. We did.

Q. Did you read this letter before the grievance was discussed or afterwards? A. Before.

Q. Did you ask Mr. Gorham any questions about the individuals named in the letter?

A. I did.

Q. What did you ask him about those individuals?

A. I asked Mr. Gorham if those individuals had been given the same opportunity to join the union as all other individuals under the jurisdiction of the I.A.M. [457]

Q. And what did he say?

A. He said they had.

Q. Did you ask him about—did you ask him any other questions about the individuals?

A. Yes, I did. I asked him if the request was in compliance with section two of the agreement between I.A.M. and the Company.

Q. That is the agreement that you have identified which is marked as Company's Exhibit No. 2 for identification? A. That is right.

Q. And what did he say in answer to your question?

A. He said it was in compliance with the provisions of that section.

Q. Did you ask him any other questions about individuals?

A. Yes, I asked him if he felt it was in com-

(Testimony of B. H. Goodenough.)

pliance with the International—with the National Labor Relations Act as amended.

Q. And what did he say to that?

A. He said it was.

Q. Did you make any other questions with respect to anything else about it?

A. I did, I asked him if he would verify that these employees had been given the same opportunity as other employees to join the union, in writing.

Q. I will show you a letter dated November 15, 1949, on the [458] letterhead of International Association of Machinists, District Lodge 39—rather 93.

I will ask you, Mr. Reporter, to mark this as Respondent Company's Exhibit No. 3 for identification.

(Whereupon the doument above referred to was marked Company's Exhibit No. 3 for identification.)

Q. Have you seen that letter before?

A. I have.

Q. Did you receive that letter? A. I did.

Q. Was that letter received in reply to your oral request to Mr. Gorham that you just represented?

A. It was.

Mr. Holmes: Do you want to show that to Mr. Bamford and Mr. McGraw?

I will offer that letter as Company's Exhibit No. 3 and request that it be withdrawn and a copy substituted.

Trial Examiner Parkes: Are there any objections?

(Testimony of B. H. Goodenough.)

Mr Bamford: No objection.

Mr. McGraw: No objection.

Trial Examiner Parkes: Company's Exhibit No. 3 has been received in evidence.

(Thereupon the document above referred to was marked Company's Exhibit No. 3 for identification and received in evidence.) [459]

* * *

RESPONDENT WESTINGHOUSE CORP.

EXHIBIT No. 3

(Copy)

November 15, 1949.

Mr. B. H. Goodenough
Mgr. Industrial Relations
Westinghouse Electric Corp.
Sunnyvale, California

Dear Mr. Goodenough:

In answer to your question regarding my letter to you of November 11, 1949, please be advised that all of those listed in this letter for termination were given the same opportunity to become members of our organization as anyone else working in your plant at Sunnyvale.

Very truly yours,

F. W. GORHAM,
Asst. Business Representative.

FWG:as

Received in evidence September 12, 1950.

(Testimony of B. H. Goodenough.)

Q. (By Mr. Holmes): Can you explain the deletion of the name, Louis Gennai? On the original it has been crossed out and an arrow had been drawn to the lower part of the letter where it reads, "Deletion o.k.'d by C. Schwartz, 11/49." Can you explain that?

A. I can. At this meeting which Mr. Gorham and Mr. Schwartz attended in my office, also Mr. McAuliffe, who is the mechanical superintendent, and the grievance in question came from his department; following the grievance meeting I asked Mr. McAuliffe to stay in my office for a minute and I reviewed them with him and suggested that he go back into his department out in the shop, contact the individuals referred to in this letter and notify them of their termination under section two of the agreement.

I further instructed him that if there was any question on their part he should show them the letter, which they were entitled to see, as well as the provision in the contract under which this letter came.

Mr. McAuliffe left my office and within an hour or so after that he called me and said that he had contacted Mr. Gennai. Mr. Gennai told him that two or three days prior to this he had offered his union dues to the steward in the [460] section in which he worked and the steward had told him that he would see him the next day. The steward, according to Mr. Gennai, became ill and did not appear at work for several days. Mr. Gennaie explained that he

(Testimony of B. H. Goodenough.)

did not know to whom he should go and had made an offer for union dues to his steward and thought he was clear on the thing.

I suggested that Mr. McAuliffe discuss the matter with Mr. Schwartz, the chief steward for the I.A.M., and if Mr. Schwartz would confirm such statement by Mr. Gennai and agreed to it, as far as I was concerned the Company would approve the deletion.

Later, Mr. McAuliffe called me and said he had discussed with Mr. Schwartz and that Mr. Schwartz had deleted Gennai's name and had initialed the letter indicating the deletion had been made. [461]

* * *

Q. Now, what action was taken, if any, with respect to Cleveland and Norris, that is also mentioned in the letter?

A. Upon investigation, it was found that Cleveland and Norris, who had been a machinist at the plant, was on what we call the disability roll and at the time of this incident he was, to the best of my recollection, in Texas.

Q. How long had he been away from the plant?

A. I don't recall. [462]

Q. Did he ever come back?

A. I don't recall. He did not.

Q. Was any action taken with respect to him?

A. No.

Q. When did you first see Clyde Scheuermann that you had a conversation with him?

A. The first time I ever talked to Clyde Scheu-

(Testimony of B. H. Goodenough.)

ermann was at the National Labor Relations Board office at the representation hearings in the jurisdiction side—jurisdiction dispute, I believe, in March of 1949.

* * *

Q. Then, when did you next have a conversation with him?

A. On the Monday, I believe, following November the 11th.

Q. Where did you see him at that time?

A. In my office.

Q. Did he come to see you or did you call him up? A. He came to see me. [463]

Q. Do you know whether it was morning or afternoon?

A. I believe it was in the morning.

Q. Do you recall the conversation?

A. Yes, I do.

Q. Would you state it as well as you can remember it?

A. He came into the office and said that he assumed that I knew why he was there. I told him that I assumed it was merely termination, and he confirmed that. He then asked if there was anything the Company could do. I said that we had, in our opinion, complied with the terms of section two of the agreement and that I didn't see that any change could be made. He indicated to me that he had been to the National Labor Relations Board and that they had suggested that he see the union

(Testimony of B. H. Goodenough.)

about the matter. I told him that inasmuch as the Board had recommended that he see the union, that I suggested that he follow their instructions, and he then left my office following that conversation.

Q. Did he, at that time, tell you that he had been expelled from the I.A.M. and fined?

A. I believe he did, yes.

Q. Had he ever told you that before?

A. No, he had not.

Q. Had anybody told you that before?

A. No one that I recall; no one had ever told me that.

Q. Had you received any communication from the union to that [464] effect? A. I had not.

Q. Did you know, other than the information you received in the letter from Mr. Gorham, whether or not Mr. Scheuermann was a non-union I.A.M. at that time?

A. I did not know whether he was a member at that time or not.

Q. On November 11, did you know whether or not he was a member of the I.A.M. other than this information in Mr. Gorham's letter?

A. I did not.

Q. Did Mr. Scheuermann tell you on that occasion when he came to your office that he was a member of the I.A.M.? A. At that time?

Q. Yes. A. No, he did not.

Q. Did he tell you that he had offered his dues and initiation fees to the I.A.M.?

A. He did not.

(Testimony of B. H. Goodenough.)

Q. Did he tell you that he didn't think it was square, that he had no way of knowing about the agreement?

A. I recall that he said something to the effect that he did not know that an agreement was in effect.

Q. Did you show him the agreement?

A. I did. [465]

Q. Did he read it?

A. If I am not mistaken, Mr. Scheuermann asked me for a copy of the agreement on that day and I asked my secretary to get one for him. I believe he folded it up and put it in the pocket without reference to it. I am not sure about that.

Q. Did he tell you he was going to see somebody at the union?

A. He told me he was going down to the union, yes.

Q. Did you have another conversation with him?

A. Yes, when he left at that time I asked him if when he had checked with the union if he would report back to me and let me know what happened. He came back after he had talked to the union. [466]

* * *

Q. Did Mr. Scheuermann ever come back to see you again?

A. No, I don't believe I ever saw Mr. Scheuermann again until the hearing started.

Q. When an employee is discharged, what is the usual custom with respect to notice to him?

(Testimony of B. H. Goodenough.)

A. When an employee is discharged for cause there is no notice; he is terminated at that time.

Q. And what do you mean by "cause"?

A. For infraction of plant rules and Company rules.

Q. What if it is for some other reason?

A. Specifically, in regard to union security requests, there is a difference because of shifts. On the first shift, of the day shift, if you receive a notification from the union of the termination of an employee, we as a rule give the employee notice during the shift and his employment terminates at the end of that shift, regardless of when the notice is received during the day, so long as it is during his working hours.

If the notice involves an employee on the second or third shift such notice is usually given at the beginning of the shift because we receive it during the day shift and the employee [468] is usually given the opportunity to work out the balance of that shift.

Q. Is the checking in of tools customarily taken care of during that balance of the night shift?

A. Well, it is rather difficult to check in tools at night. They are usually permitted to come in the next day to check in their tools.

Q. Had the Company ever discharged under a union security clause prior to the discharge of Mr. Scheuermann?

A. Yes, several people were terminated under the old contract closed shop agreement.

(Testimony of B. H. Goodenough.)

Q. Was written notice received in the union on such occasions? A. By the union?

Q. From the union?

A. From the union, in all such cases.

Q. Do you know a Mrs. Chloe Andersen?

A. I do now.

Q. Did you know her prior to this hearing when she appeared as a witness?

A. To the best of my knowledge, I had never seen her before.

Q. Had you ever worked with her or had she ever worked for you? A. No.

Q. Had you ever had a conversation with her?

A. To the best of my knowledge, no; unless it was by telephone. [469]

Q. Do you know of a mezzanine office in the building where Mr. McAuliffe works?

A. I know one is there.

Q. Is that building 41 there? A. Correct.

Q. Do you know of a mezzanine office there?

A. I do.

Q. You heard Mrs. Andersen's testimony that she worked for some months in such a mezzanine office? A. I did.

Q. Have you been to that office?

A. I never had.

Q. Are you out in the plant in building 41 frequently or infrequently? A. Infrequently.

Q. For what purposes do you go out in the building, 41?

A. On some occasions, the foreman and super-

(Testimony of B. H. Goodenough.)

intendents in the building have asked me to come out there to discuss grievances in the plant which come to my level, and agreement procedure on other occasions. I have gone into the building for training meetings with the supervisors. On other occasions I have gone out to the building to discuss matters with Mr. Schwartz or with the foremen or supervisors in the building.

Q. On these occasions, except for the meetings with supervisors, did you customarily stay out there very long? [470] A. No.

Q. For about how long would your visits last?

A. Oh, five or ten minutes.

Q. How frequently would they occur during the past two years?

A. I would say I was in the building 41, on an average of once a month, perhaps.

Q. During the last two years? A. Right.

Q. Are you familiar with Mr. McAuliffe's office in that building? A. I am.

Q. Is there a second office near his?

A. Yes, there is.

Q. And is there an office next to that?

A. There is.

Q. I will give you a blank sheet of paper and ask you if you can draw a diagram showing the respective locations of those three offices.

(Thereupon the witness was handed a blank sheet of paper and drew the above mentioned diagram.)

(Testimony of B. H. Goodenough.)

Q. Who is Mr. Culbertson?

A. Mr. Culbertson is staff assistant to the mechanical superintendent, Mr. McAuliffe.

Mr. Holmes: I will ask the reporter to mark this diagram [471] that Mr. Goodenough has drawn as Company's Exhibit No. 4 for identification.

(Thereupon the document above referred to was marked Company's Exhibit No. 4, for identification.)

Mr. Bamford: May I ask a question. I am a little bit perplexed. Is this the mezzanine office or is this an office on the main floor of Building 41?

The Witness: It is on the first floor.

Mr. Holmes: He stated he had never been in the mezzanine office.

Mr. Bamford: That is what I wanted to know, I was a bit uncertain about it.

Mr. Holmes: Do you wish to see this before I question him about it?

Q. (By Mr. Holmes): What is the customary entrance to Mr. McAuliffe's office, is it from the secretary's office or from the hall?

A. As far as I'm concerned, it's from the hall.

Q. Do you know whether people ordinarily go directly through the hall or through the secretary's office?

A. The majority of meetings, which have been few that I have attended in Mr. McAuliffe's office, I believe we have gone in the office door from the hall.

(Testimony of B. H. Goodenough.)

Q. Have you ever gone through the secretary's office into Mr. McAuliffe's office for a meeting? [472]

A. I can recall only one occasion, Mr. Holmes. I was in a meeting in Mr. Culbertson's office and we adjourned and went into Mr. McAuliffe's office and had to go through the secretary's office.

Q. Is that the only time that you can recall?

A. That is the only time that I recall, yes.

Q. Is it necessary for a secretary in the office indicated on the diagram to pass the door of Mr. McAuliffe's office going from her office to Mr. Culbertson's office.

A. I would say she would have to go around this end of her desk. Mr. McAuliffe's office is in front of the desk.

Q. You say she would have to go around the end of the desk and away from Mr. McAuliffe's office in order to pass the door to Mr. Culbertson's office?

A. I remember exactly the desk sits like this and always has been. The secretary sits there, she would have to follow this path.

Mr. Holmes: Would you mark "desk" there where you have drawn this small rectangle.

Mr. Bamford: Is the round place back of the desk the secretary's chair?

The Witness: That is.

Mr. Bamford: Would you mark "chair" on that.

Q. (By Mr. Holmes): Now, where is this with respect to the working area in Building 41, which direction is the shop? [473]

(Testimony of B. H. Goodenough.)

A. Out this hall, office along here (indicating) and the conference room office, and you come to the working area along here. There is also across from Mr. Auliffe's office, in about this location, a conference room and you may get access to the working area through the shop door which goes out back of the conference room.

Q. You indicated to the left of this diagram as a means of going to the shop?

A. I would say this direction (indicating) which would be to your right.

Q. Now, do you recall during the last five months of 1949, being at a meeting in Mr. McAuliffe's office when he was absent?

A. I do.

Q. Can you state about when such a meeting took place?

A. It was when we were having a problem in regard to laying off welders under Sheldon Huffman, who is the welding foreman under Mr. McAuliffe. I would say that it occurred in the month of September.

Q. And can you state the approximate date?

A. No, I can't.

Q. Who was present at this meeting?

A. Well, there were several people who were presently called in and then left and others replaced them. Mr. Buckingham, the superintendent of turbine assembly was there; Sheldon [474] Huffman, the welding foreman, was there; Walley Harrison, foreman of tool cribs; and mechanical

(Testimony of B. H. Goodenough.)

department, maintenance, Tommy Shields, foreman; I believe Mr. Gorham was there, and I think that Mr. Schwartz and perhaps Mr. Sohm, both of whom are stewards for the I.A.M.; and Mr. Clark was there for a while. [475]

* * *

A. If I recall, the meeting was called originally by Mr. Buckingham, the turbine superintendent, who was acting in Mr. McAuliffe's behalf during his absence, to discuss this question involving only the welders under Mr. McAuliffe's supervision when we started the meeting, the question came up in regard to transferring the welders from Mr. Huffman's section over to Building 61 under Mr. Ghiorso and, at that time, we called Mr. Clark and Mr. Ghiorso. They were not there when the meeting started.

Q. What subjects were discussed other than this layoff of welders?

A. Well, the whole plant was going down rapidly, as far as production schedules were concerned, and we were having layoffs every week in the majority of departments under Mr. McAuliffe's supervision as well as other sections in the plant. It was getting to the place where the problem of seniority versus ability was quite acute and we were reviewing the seniority lists in regard to contemplated layoffs in other sections of [476] the plant other than the welding department.

Q. Was that problem discussed with respect to any individuals? A. In this meeting?

(Testimony of B. H. Goodenough.)

Q. Yes.

A. Yes, it was discussed in regard to specific individuals.

Q. What individuals?

A. I recall two specifically: Mr. Marovich and a man by the name of Ashton.

Q. Anybody else?

A. No, I don't recall anyone else discussed at that time.

Q. Was Mr. Clyde Scheuermann discussed?

A. No.

Q. Was his name mentioned? A. No.

Q. Was Charles "Pat" Pachorik mentioned?

A. I don't believe he was.

Q. Was his name mentioned at all in the meeting? A. No.

Q. What was said with respect to Mr. Marovich and Mr. Ashton, and who said it?

A. Tommy Shields had additional layoffs coming up in his section and we took the seniority list which showed all the employees in the mechanical section under the various department heads by seniority. Tommy Shields indicated that he had a certain number of people to lay off and that if he laid them [477] off in the manner in which he felt was advisable, he would not be able to follow seniority. He referred then to the fact that he did not feel Marovich and Ashton were carrying their share of the load in the department and that in the next layoff which came in his department, they should be included. I remember the conversation

(Testimony of B. H. Goodenough.)

quite specifically because we had been adhering quite strictly to seniority in some of the sections. I said, "I think you fellows should also bear in mind that when you go outside the seniority provisions, you must be certain that the employee is not capably performing his work, because in most of these cases, you can be assured that you will receive a grievance. You must be able to justify your decision."

Q. Was anything else said with respect to those two?

A. Shields said that he felt without a doubt that he would be able to justify his position with the union in both of these instances.

Q. Anything more said in respect to those two individuals? A. Not that I recall.

Q. Did Mr. Gorham request that you get rid of Mr. Marovich? A. No.

Q. Did Mr. Gorham request that you get rid of Mr. Floyd King? A. No.

Q. Did Mr. Gorham request that you get rid of Mr. Pachorik? [478] A. No.

Q. Did Mr. Gorham request that you get rid of Mr. Scheuermann? A. No.

Q. Did Mr. Gorham request that you get rid of anybody? A. No.

Q. Did he make any such similar request?

A. No.

Q. That you lay off, discharge, or terminate any of those named individuals? A. No.

Q. Was the name of Mr. Floyd King mentioned

(Testimony of B. H. Goodenough.)

in that meeting? A. Not at that meeting.

Q. Not by anyone?

A. Not that I know of.

Q. Did Mr. Gorham, in that meeting, say anything about the contract being buttoned up.

A. In September?

Q. This meeting that you discussed.

A. No, because the contract was a long ways from being buttoned up at that time.

Q. Did you say anything about Mr. Gorham having been a good boy in signing the contract?

A. I did not.

Q. Did you say anything about you ought to concede to Mr. [479] Gorham's request because the contract had been completed, or similar to that?

A. No.

Q. Did any spokesman for the union, in that meeting, make any request that any particular individual be discharged or terminated or laid off and gotten rid of? A. Not in that meeting, no.

Q. Was there any decision reached in that meeting with respect to Mr. Ashton and Mr. Marovich?

A. I think the meeting ended pretty much on the vein of the previous testimony in regard to laying off outside of seniority. Telling them that if they did not follow the seniority provisions, that they should be absolutely certain that they had a case in regard to the individual as to his capabilities to perform his job, his performance record, and so forth, because in most of those cases, I felt certain

(Testimony of B. H. Goodenough.)

that they would contemplate grievances. The reason I was so interested in that phase of it at that time, is because we were getting down to a point where the majority of the people on the roll had considerable seniority, regardless of whom we dealt, we had a seniority problem, most of them with two or three years of service.

Q. Were any of the union representatives in that meeting told that you would lay off any particular individuals? A. No, not at that meeting.

Q. Did you attend any other meeting in Mr. McAuliffe's office [480] while Mr. McAuliffe was absent during the last five months of 1949?

A. I don't believe I did, no. [481]

* * *

Q. Did you receive those cards in the normal course of your work. A. I did.

Q. From whom did you receive them?

A. I believe I received these specific cards from Mr. Gorham.

Q. Did he bring them to you personally?

A. He gave them to me at the grievance meeting. The grievance had progressed to the third stage, which is my level on grievance forms.

Q. Was the meeting for the purpose of considering these two grievances? A. It was.

Q. Did you discuss the grievances with Mr. Gorham? A. Yes, sir.

Q. Would you state the subject of the two grievances?

(Testimony of B. H. Goodenough.)

Mr. Bamford: May I see the cards, please, before any further questions?

The Witness: The subject of both grievances was the same, that the two employees had been laid off because of inability to perform the work and laid off outside of seniority and the [483] union had protested the layoff, stating that other employees should be laid off before these.

Q. Did you have these cards before you when you discussed the matter with Mr. Gorham?

A. I did.

Q. Do you recall the approximate date when you discussed it with him?

A. Oh, it was around the 21st or 22nd of September, I think.

Q. I will refer you to your signature at the bottom of the card and ask you if the numerals "9-22" will refresh your recollection?

A. Yes.

Q. Was that the date on which you discussed these two grievances with Mr. Gorham?

A. It was.

Q. Do you recall the discussion that took place?

A. Yes, fairly well.

Q. Where did it take place?

A. It took place in my office.

Q. Would you relate it please?

A. Mr. Gorham and, I believe, Mr. Schwartz, the chief steward, was there. Mr. McAuliffe was there, and Mr. Gorham said——

Q. Was Mr. Shields there?

(Testimony of B. H. Goodenough.)

A. I am not sure. Mr. Gorham said that he felt these two employees were being discriminated against and that the answers [484] which had been put on the grievance form by the immediate supervisor, Mr. Shields, by Mr. McAuliffe, the superintendent, were unsatisfactory answers and that he did not want the termination to take place. That they were employees who had greater seniority than these individuals and who were just as capable of performing the work, they should be retained.

And we discussed the pros and cons of these two individuals as to their ability to perform the job which had been assigned to them, their meeting of production requirements, and since it had come to my level in the grievance procedure, I stated that I felt the statement made by Mr. Shields and Mr. McAuliffe indicated that these employees had been treated properly and terminations would take place; there would be no change in the answers made by Mr. McAuliffe. I then wrote on the grievance form that we had reviewed the grievance with the union and the management's opinion was that proper treatment had been given by the superintendent to these individuals concerned.

If I recall, customary practice is that I give both copies of the form to the business agent of the union and he reviewed them and discussed them for a few minutes with Mr. Schwartz.

Q. In your presence?

A. In my presence, I believe. He signed the grievance forms and returned the management copy

(Testimony of B. H. Goodenough.)

to me and he retained the union copy for himself. [485]

Q. Now, I don't think I quite understand your testimony when you said there were individuals with less seniority retained; is that correct?

A. That is correct.

Q. Whom you felt had better ability to do the work? A. That is correct.

Trial Examiner Parkes: I think probably he made a slip of the tongue when he made his answer. Would the reporter please read the answer?

(Question read.)

Q. (By Mr. Holmes): In your answer that has just been read back to you, you said something about retaining employees with more seniority; is that what you intended to say, or was it a slip of the tongue?

A. It was a slip of the tongue; employees with less seniority were retained.

Q. Would you re-state again just what you told Mr. Gorham?

A. Mr. Gorham protested on the basis that we were laying these people off improperly. First, that they could perform all the work as well as other employees on the roll who had less seniority than these two individuals had; and, second, that they were satisfactory workmen in regard to their ability to perform the job.

Q. And what did you tell him in reply to that?

A. Well, after a discussion of the merits of

(Testimony of B. H. Goodenough.)

these individuals [486] versus other employees in the same operations, I came to the conclusion that the decision handed down on the grievance form by Mr. Shields and Mr. McAuliffe was correct and that in the management's opinion, after reviewing the case, we felt that the answer submitted at the first two levels of the grievance procedure were correct and should stay.

Q. Did you tell that to Mr. Gorham?

A. I did, and then I wrote that on the grievance form in the third step of the grievance procedure.

Q. Is this sentence appearing above your signature and below the signature of Mr. McAuliffe, is that the sentence that you are referring to?

A. It is.

Q. What did you do after you wrote that there?

A. I handed the form to Mr. Gorham to be discussed with the other union representative present and after some discussion, signed his name, returned the management copy to me and retained the union copy for himself.

Q. What is the check "unsatisfactory" mean?

A. A check mark on "unsatisfactory" in any stage of the grievance procedure means that the union is not satisfied with the answer and would like to carry it to the next level in the grievance procedure.

Q. And what does "satisfactory" mean?

A. "Satisfactory" means that the grievance has been [487] satisfactorily reviewed, as far as both parties are concerned, and closed the case.

(Testimony of B. H. Goodenough.)

Q. Were both of these cases treated in the same way? A. They were.

Q. Do you recognize the signature of Mr. McAuliffe on these two cards? A. I do.

Q. Have you seen it before?

A. Many times.

Q. Have you seen the signature of Mr. Shields before? A. I have.

Q. Do you recognize his signature on the card?

A. I do.

Q. I think you previously stated you had seen the signature of Mr. Schwartz; do you recognize it on this card—or, rather, on these cards?

A. I do.

Q. On the front and back?

A. Yes, that is of each card.

Mr. Holmes: I will offer these two cards in evidence as Company's Exhibit No. 5 and 6, and request that they be withdrawn and copies substituted in their place. Mr. Ashton is No. 5, serial number -00008, and Marovich, No. 6, serial number 00009.

Mr. Bamford: I have no objection to their being admitted [488] in evidence. However, I would like an opportunity to compare the originals with the copies, and I may suggest then that the originals stay in the exhibit. [489]

* * *

Q. Is it true that seniority then accumulated at this plant while Westinghouse has operated, is

(Testimony of B. H. Goodenough.)

added on to seniority accumulated during previous service with the Joshua Hendy works?

A. That is right.

Q. Is seniority acquired at some other Westinghouse plant under some other agreement added on to security or seniority accumulated at this plant?

A. It is not. [490-b]

* * *

B. H. GOODENOUGH

a witness called by and on behalf of the Respondent, having been previously sworn, was recalled, examined and testified as follows:

Direct Examination

(Continued)

By Mr. Holmes:

Q. Mr. Goodenough, I will show you a document which purports to be a copy of an agreement with the International Association of Machinists and ask you if you can identify that as the agreement applicable at the Westinghouse plant prior to March 31, 1949?

A. Yes, that is the agreement under which we operated.

Q. From what date?

A. From some time in April or May of 1947 until March 31, 1949. [494]

* * *

(Testimony of B. H. Goodenough.)

Q. (By Mr. Holmes): Mr. Goodenough, I will show you a document which purports to be the signed copy of an agreement between Westinghouse Electric Corporation, Sunnyvale plant, and District Lodge No. 3, Local 504 of the International Association of Machinists, and ask you if you can identify that as the original signed copy of that agreement? A. Yes, I think it is.

Q. Was that signed under the circumstances that you related in your testimony yesterday?

A. It was.

Q. Referring now to Section 2 and the date contained therein, it would appear on this agreement that the date is in different ink around the rest of the Section, as though it were not printed at the same time as the rest of the Section. Can you explain that?

A. During the course of negotiations, we ran off various [495] drafts of the contract for negotiating purposes on the mimeograph forms, which are reproducible, and when we finally came to an agreement that we were ready to sign, we used as many of the masters as we could for reproduction. That date, of course, was blank up until the time that we had reached agreement and it was then typed in before the agreement was signed.

Q. Typed on the master copy?

A. It would be; yes, it was.

Q. Then, was the master copy used to run off this copy? A. That is right.

(Testimony of B. H. Goodenough.)

Q. And you did not then fill in that date in Section 2 in your own handwriting?

A. No. I did not.

Q. Please refer to the last page in the document and the date above the signatures. Can you tell me who filled that in? A. I did.

Q. That is your writing or printing?

A. It is my printing.

Mr. Holmes: I will offer this in evidence and request permission to withdraw it and substitute a copy which has been previously furnished the Trial Examiner, previously identified as Company's Exhibit No. 2 for identification.

Trial Examiner Parkes: Respondent Company's Exhibit No. 2 is received in evidence.

(The document heretofore marked Respondent Company's Exhibit No. 2 for [496] identification, was received in evidence.) [497]

* * *

Cross-Examination

By Mr. Bamford:

* * *

Q. Now, directing your attention to the first conversation you had with Mr. Gorham in which Mr. Gorham presented General Counsel's Exhibit No. 6 to you—that is, the letter requesting Scheuermann's discharge and Gennai's and others—where did that conversation take place? A. In my office.

Q. And was there anyone else present besides Mr. Schwartz and Mr. Gorham?

A. When the meeting started, no.

(Testimony of B. H. Goodenough.)

Q. There were just the three of you in the meeting? A. That is correct.

Q. And was this in the afternoon?

A. I believe it was in the morning.

Q. And had you arranged for the meeting?

A. Mr. Gorham and I had arranged for the meeting, if I recall [532] correctly, to discuss a grievance.

Q. And what was that grievance?

A. I do not recall.

Q. Do you recall the nature of the grievance?

A. I do not.

Q. Did you discuss the grievance?

A. We had a meeting, yes.

Q. About the grievance? A. That is right.

Q. Now, at what point during the meeting did Gorham present you with the letter?

A. When we came into my office.

Q. And, at that time did you engage in the conversation that you mentioned under direct testimony? A. I did.

Q. Before you discussed the grievance, is that correct? A. That is right.

Q. But Schwartz was there at the same time?

A. I believe he was.

Q. And what did Gorham say when handed you the letter?

A. I don't recall that he said anything. He had an envelope which he took from his pocket and handed to me. The envelope, as I recall the meeting, I opened; then read the letter.

(Testimony of B. H. Goodenough.)

Q. And, then, what was said and by whom?

A. I asked Mr. Gorham if he felt that the contents of the [533] letter were in compliance with the terms of Section 2 of the agreement. He said that he did. I, then, asked him if the three employees referred to in the letter had been given the same opportunity to become members of the I.A.M. as had all other employees under the jurisdiction of the I.A.M. He replied in the affirmative. I asked him if the contents of the letter and the action contemplated therein was in compliance with the provisions of the National Labor Relations Act, as amended. He replied that he felt certain they were; and then, I asked Mr. Gorham if he would be willing to submit to me a letter over his signature that those employees had been given the same opportunity as all other employees in the plant to become members of the Union. He said that he would furnish such a letter.

Q. Did you discuss any of the individuals by name? A. I don't believe we did.

Q. Was there anything else said with respect to the letter that you remember?

A. About that stage of the meeting, I believe Mr. McAuliffe came in. Mr. McAuliffe was scheduled to be at the meeting and I showed the letter to Mr. McAuliffe; and then suggested that we get on with the business at hand and that I would discuss the matter with Mr. McAuliffe after we had handled the grievance.

(Testimony of B. H. Goodenough.)

Q. Well, Mr. Auliffe had come in to discuss the letter or [534] to discuss the grievance?

A. Mr. McAuliffe came in to discuss the grievance.

* * *

Q. Well, had you met and spoke with him on both of those previous occasions?

A. I don't believe I was ever formally introduced to Mr. Scheuermann. I spoke to him just casually—to say how do you do—on both of those occasions.

Q. Now, you knew who he was, though?

A. Oh, yes.

Q. But you did not ask Gorham anything special about Scheuermann? [535] A. I did not.

Q. Did you know or had you heard that Scheuermann had been finally expelled from the I.A.M.?

* * *

A. I had never been told that he had, no. [536]

Q. And after the discussion of the grievance had been concluded, did Mr. Schwartz and Mr. Gorham then leave? A. They did.

Q. And you and Mr. McAuliffe discussed the letter, is that correct? A. We did.

Q. Now, will you state, please, as best you can remember, the conversation with Mr. McAuliffe?

A. Well, I told Mr. McAuliffe, who had been in on all of the contract negotiations with me, that this was, of course, applicable under Section 2 of the agreement with the I.A.M. and that as superintendent of the mechanical section where these employees worked, he should take the letter down into

(Testimony of B. H. Goodenough.)

his office, call the employees in, show them the letter, explain to them what it meant, show them the paragraph or section in the contract to which the letter related and tell them that under the terms of the contract it would be necessary for management to terminate their employment; that he should call me if he felt it necessary while, or after, he was talking to these employees.

Q. Did you discuss any of the individuals by name? A. We did not.

Q. Did Mr. McAuliffe agree to do as you suggested? A. He did.

Q. And Clyde Scheuermann's name was mentioned specifically, [539] is that correct?

A. All three of the names were mentioned in the conversation.

Q. How?

A. By reading the letter and asking Mr. McAuliffe if all three of those individuals worked for him. He said, yes.

Q. And there was nothing said, I take it, at that time that Scheuermann had been expelled from the union and fined? A. There was not.

Q. Had you ever discussed the matter of Scheuermann's expulsion with Mr. McAuliffe prior to that time? A. I had not.

Q. Prior to that time, had you ever discussed the matter of Mr. Scheuermann at all with Mr. Auliffe and Mr. Schwartz? A. No.

Q. Or any other I.A.M. official or shop steward?

A. I had not. [540]

* * *

(Testimony of B. H. Goodenough.)

Trial Examiner Parkes: It was my understanding, too. If you intend otherwise, I suggest that you re-phrase the question.

Mr. Bamford: I will re-phrase the question and start again.

Q. (By Mr. Bamford): Was Mr. Scheuermann's expulsion discussed during any of the negotiating meetings? A. It was not.

Q. Was the possibility of his discharge under some sort of a union security contract ever discussed? A. Never.

Q. Either with the Union or with other officials?

A. Never.

Q. To your knowledge, then, the first time that the discharge of Clyde Scheuermann was discussed was with you and Mr. McAuliffe that day, is that correct? A. That is right.

Q. Now, did Mr. McAuliffe call you back or see you again with respect to the interview he had with Scheuermann?

A. He didn't see me again, but he called me that same day. [541] Pardon me. You say in relation to Scheuermann? No, he did not. [542]

* * *

Q. (By Mr. Bamford): Except for the period from April 1, 1949 to October 10, 1949, ever since you started working at Westinghouse there has been a union security provision in the contract, hasn't there? A. With I.A.M.? Yes.

Q. Now, how many people have been discharged during that period out of the I.A.M. unit?

(Testimony of B. H. Goodenough.)

Trial Examiner Parkes: You mean at this plant?

Mr. Bamford: At this plant, yes.

A. I would estimate that there were, at least, six and probably more terminations in that period under the I.A.M. contract. There were others under the other union contract. Specifically, as to exact figures, I don't recall.

Q. Can you name any of the individuals?

A. No, I can't.

Q. Do you remember when any of them occurred?

A. Well, some of them occurred between October of 1948 and March 31, 1949.

Q. How many people have been discharged under the present contract apart from Scheuermann, of course?

Mr. Holmes: For what reason?

Mr. Bamford: For union security. [549]

The Witness: I think two or three others.

Q. (By Mr. Bamford): Can you name them?

A. No, I don't recall the specific names. I think there was one about three or four weeks ago. [550]

* * *

Q. Was it customary for letters requesting the discharge to be sent to Mr. Kelley?

A. Under the old contract, they were sent to Mr. Kelley on some occasions and on some occasions they were sent to me. The majority went to Mr. Kelley.

Q. And the practice has been varied under the new contract?

(Testimony of B. H. Goodenough.)

A. All such letters are now directed to my attention.

Q. Why?

A. Why, because I requested the union to follow that procedure.

Q. Now, when Mrs. Andersen appeared on the stand the other day, did you recognize her by sight? [551] A. I did not.

Q. How many female clerical employees are there in the plant?

A. Between 150 and 175.

Q. And would you say that you recognize all of them by sight? A. I certainly would not.

Q. Or by name? A. I would not.

Q. Now, directing your attention to the one conversation that you said you attended in Mr. McAuliffe's office when he was absent during the last five months of 1949—that I think you said occurred in September, "but I wasn't sure when"—is that correct? [552]

* * *

Q. Were there any union representatives present? A. There were not.

Q. Prior to that time, had anyone been laid off out of seniority? A. Yes.

Q. How many in the machinists Union?

A. Mr. Bamford, from the middle of March until December the roll in the Machinists Union went down from, if I am not mistaken—about 1,290 people to around 400 people. It is impossible for me to testify as to the sequence of those layoffs and

(Testimony of B. H. Goodenough.)

how many people were laid off outside of seniority. But I know that in that period there were layoffs outside of seniority in several of the departments.

Q. Can you recall any specific instance or any specific name of anybody laid off out of seniority?

A. I recall a specific instance or instances in Building 61 in switch gear welding and transformer welding. There were also specific instances in the turbin assembly department and there were people on the roll at that time—at the time of this meeting—in almost all of the mechanical sections who had less seniority than some individuals who had been laid off.

Q. The usual departure from seniority was because of merit rather than lack of ability? [569]

Mr. Holmes: I don't understand that—"merit rather than lack of ability."

Mr. Bamford: You can let a man with higher seniority go because he is bad, or you can keep a man with higher seniority. I am trying to find out the preference.

Trial Examiner Parkes: Does the witness understand the question?

The Witness: I think I do.

I would say that all people who were retained out of seniority were retained because management felt that they would have to be retained to maintain efficient operation of the organization. [570]

* * *

(Testimony of B. H. Goodenough.)

Q. Well, do you know about how many years the employees who you were normally laying off at that time had with Westinghouse or Hendy?

A. Mr. Bamford, at that time we had people on the roll who had been there only five or six or seven months, who were retained on the roll because of special skills on certain jobs; and there had been people who were laid off with as high as five or six or seven years of seniority—with considerable opposition by the Union.

Q. At that time, is that correct?

A. At that time.

Q. But in the normal course of events at about that time, how many years had employees been working who were being laid off?

Mr. Holmes: At what time?

Mr. Bamford: At the time of this conference.

The Witness: I would say that to all intents and purposes, in September and October of 1949, we were up to people who had [571] two, three and four years of service. [572]

* * *

Q. How?

A. Mr. King was transferred early in September from one job to another. He was in the mechanical section as a machinist and was moved from that section to Mr. McAuliffe's department as a result of a machinery rejuvenation and location problem in the plant. Mr. Gorham, at one time, came in to see me and said that he didn't favor

(Testimony of B. H. Goodenough.)

that move because Mr. King had been retained outside of seniority, I believe, and that this move put him into a department where his seniority might protect him; and that he felt that was unfair to the other employees with greater seniority.

I told him, I believe, that I had no knowledge as to Mr. Kings' abilities as compared to other people in the section; that I felt that before he brought any grievance or any protest to my office, that he should certainly discuss it with the foreman and the superintendent of the mechanical section. Mr. Gorham, if I recall, said that he would discuss it with Mr. McAuliffe.

Q. To your knowledge, did he?

A. To the best of my knowledge, he did. Yes.

Q. Did Mr. McAuliffe speak to you about it?

A. No, I said—if I recall correctly—Mr. Gorham told me later that he had talked with Mr. McAuliffe and Mr. McAuliffe had said that Mr. King was going to stay in the maintenance department. [578]

Q. And when did this come up, do you remember? A. When did this——

Q. When was your first discussion with Gorham about King?

A. It was shortly after he had been transferred. I would say it was probably within a week after he was transferred because the union usually doesn't wait very long on those things.

Q. But the matter was processed first by griev-

(Testimony of B. H. Goodenough.)

ance and was brought directly to you by Mr. Gorham?

A. As I recall it, yes. There was never any formal agreement filed on the thing.

Q. Was that the customary procedure?

A. There were times when Gorham called me on the phone and came into my office to discuss union problems, yes.

Q. At the third level?

A. There were times, yes.

Q. Did this first discussion with Gorham occur before or after the Marovich conference?

Mr. Holmes: I object to "the Marovich conference."

Mr. Bamford: I was just using a short cut. I will rephrase the question.

Q. (By Mr. Bamford): Did the first conference with Gorham, with respect to King, occur before or after the general conference on welders and layoffs in the mechanical department?

A. I don't know.

Q. Was it about the same time? [579]

A. I would say it was within the first three weeks of September, yes. [580]

* * *

Redirect Examination

By Mr. Holmes: [597]

Q. Where were the meetings held?

A. The majority of the meetings were held in

(Testimony of B. H. Goodenough.)

my office. There were one or two meetings held in the conference room on the second floor of Building 82. [598]

* * *

Q. I believe you testified that you saw Mr. Scheuermann first—that is by knowing him by name—at the representation hearing early in the spring of 1949, is that right?

A. That is right.

Q. Did Mr. Scheuermann testify at that hearing? A. Yes, he did.

Q. Were you present? A. I was. [598-B]

* * *

Q. I believe you mentioned a conversation with Mr. Gorham pertaining to Mr. King and the fact that he had been retained although individuals with more seniority had been laid off. Was anybody else present at that conversation?

A. I don't believe so, no.

Mr. Holmes: I think that is all.

Trial Examiner Parkes: Mr. McGraw, do you have any questions you would like to ask Mr. Goodenough?

Q. (By Mr. McGraw): Mr. Goodenough, is it fair to say that during the negotiations in 1949, that the question of wage administration was, perhaps, one of the biggest issues between the parties —between the I.A.M. and the Company?

A. I think it was. Yes. [598-C]

* * *

(Testimony of B. H. Goodenough.)

Q. (By Mr. Bamford): Did Gorham come in to see you about a transfer of King from one department to another department?

A. I believe I have testified that I do not recall whether he came in to see me or called me on the phone.

Q. Or however you talked with Gorham, then?

A. He did talk to me in relation to a transfer of King.

Q. And what was said about the transfer of King?

A. Well, that Mr. King should not have been transferred and that he had been retained out of seniority. [598-J]

JOHN J. McAULIFFE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes:

* * *

Q. You are employed by Westinghouse Electric Corporation, Sunnyvale plant? A. Yes.

Q. In what capacity?

A. As Mechanical Superintendent.

Q. And generally what are the duties of your position?

A. Well, I supervise the—the plant is broken

(Testimony of John J. McAuliffe.)

down into two sections, the Electrical and Mechanical, and I supervise the activities in the shop, in the factory end of the Mechanical Section.

Q. That is, mechanical production?

A. Yes, that's right.

Q. Do machinists and welders and mechanics of various sorts work in the department that you supervise? A. They do. [601]

* * *

Q. On or about November 11, 1949 did you attend a grievance meeting in Mr. Goodenough's office? A. I did.

Q. Do you remember who was there on that occasion?

A. Let's see—Mr. Goodenough was there, Mr. Gorham, Mr. Schwartz, myself—I believe that is all.

Q. Did you arrive at the beginning or did you arrive after the other individuals were there?

A. No, I was the last one to come in. I think I came in a few minutes late.

Q. What was the purpose of the meeting?

A. Well—— [603]

Q. So far as you knew before you got there?

A. It was a grievance that had gone through the regular routine up to Mr. Goodenough and I was called up there by Mr. Goodenough to discuss it with Mr. Gorham and Mr. Schwartz. Now, I don't remember what the grievance was now, but it was a grievance, anyway.

(Testimony of John J. McAuliffe.)

Q. It had gone through the regular process?

A. Yes.

Q. What occurred when you entered the room?

A. Well, as I remember, they were about ready to begin discussing the grievance, and when I came in Mr. Goodenough tossed me a letter, and I glanced at it and then the grievance meeting started.

Q. I see. Did you mention this letter to—did anybody mention the letter or its contents before the grievance was discussed?

A. Not as far as I know, no.

Q. Not while you were there?

A. No, that's right.

* * *

Q. (By Mr. Holmes): I show you a document which is in evidence as General Counsel's Exhibit 5, I believe. It isn't marked on the Exhibit—yes, it is marked as General Counsel's Exhibit 6—and ask you if you can state whether or not this is a copy of the letter which you saw on the occasion you have [604] just referred to?

A. Yes, that's it. I didn't, however, have these notations on it when I got it.

Q. All right. Now, what occurred after the grievance, the discussion of the grievance was completed?

A. Well, as I remember it, after the discussion was over I waited in my chair there until Frank Gorham and Carl Schwartz left, and I read the letter again and then Mr. Goodenough told me that

(Testimony of John J. McAuliffe.)

I should take it down and take care of the matter. That is, the way he put it, was that I should talk to the people involved and terminate them in accordance with the letter.

Q. Did you return to your offices then?

A. I did.

Q. During the course of the day did you get in touch or attempt to get in touch with the individuals named in the letter? A. I did.

Q. The first name appearing therein is Louis G. Gennai? A. Louis Gennai, yes.

Q. Did you talk to him?

A. I did. I had him come over to my office.

Q. About what time?

A. According to my recollection it was right after lunch.

Q. All right. What did you tell him?

A. I told him that in accordance with our contract with the [605] Union and due to his failure to pay dues, to pay his dues, we had been instructed by the Union to terminate him, and I gave him the letter to read.

Q. I see. What did he tell you?

A. Oh, he said that he was very disturbed and he said that he had attempted to pay his dues to a steward in his department. He was in the Welding Department by the way. He had attempted to pay his dues to a steward in the Welding Department and for some reason or other the steward was—didn't take them or didn't have his book or something, and he had put it off for a period. And then

(Testimony of John J. McAuliffe.)

the steward was out sick, so he never did—apparently never did pay his dues. So I told him that he had better go down and see Schwartz about it.

Q. Does Mr. Gennai speak English well?

A. Not very well, no.

Q. Did you talk to him again later in the day?

A. No, I didn't.

Q. Did you talk to Schwartz about it?

A. I did. I went down and talked to Carl Schwartz, probably about an hour later, and Schwartz told me then that there was—that everything was all right.

Q. I direct your attention to the marks on the name of Louis G. Gennai and the notation in ink at the bottom. A. Yes.

Q. Can you state when those marks were made on the original [606] letter and when the notation was made in ink on the original letter?

A. Yes. I went down and talked to Schwartz, as I told you before, and then I immediately came back and called Mr. Goodenough and told him the the circumstances of these things. Well, he said, "If that is the case, then get Schwartz to indicate that on the letter." So I then had my secretary call down in the department where Schwartz was located and he came up to my place and he—to my secretary's place, and he put that on there.

Q. He wrote it on then?

A. He wrote it on then, he wrote it on there, yes.

(Testimony of John J. McAuliffe.)

Q. Did you attempt to get in touch with Cleveland A. Norris?

A. Cleveland Norris—in looking up the records in my office, in my secretary's office, Cleveland Norris had been out for some time due to a disability, and according to the report he was then in Texas, so we made no further attempt to do anything about that.

Q. Did he ever return to the plant?

A. No, he didn't. That is, he didn't return to my department, anyway.

Q. Did you make any attempt to get in touch with Clyde W. Scheuermann?

A. Yes. Scheuermann was on the second shift, so I notiffed the foreman in the department that Clyde Scheuermann worked in [607] and had Clyde Scheuermann come over to see me as soon as he came on, at the beginning of the second shift.

Q. Did he come right into your office?

A. Yes, he did.

Q. About what time of day was that?

A. It was just about four-thirty.

Q. Is that when the second shift begins?

A. That is when the second shift begins, yes.

Q. Did he come in to see you?

A. Yes, he did.

Q. What was said on that occasion?

A. Well, I told him the same thing that I told Gennai, that we had been notified by the Union to terminate him because of his failure to pay dues, in

(Testimony of John J. McAuliffe.)

accordance with the contract, and I immediately handed him the letter.

Q. Did he read it, so far as you could tell?

A. Yes. He took considerable time reading it.

Q. Then what was said?

A. Well, Scheuermann said—he said, "I don't know anything about it." As near as I can remember those were his exact words, "I don't know anything about it."

Q. What did you say?

A. I said, "Well, we have been notified to terminate you, as you see there." Then he looked at the letter again and he said, "Well, what do you think I ought to do about it?" So [608] I said, "Well, why don't you talk to the Union about it?" And he said, "That wouldn't do me any good." Then I said, "Well, why don't you talk to your attorney?" And I guess he gave it some consideration. There was a silence for a period. Then he said, "Could I have a copy of this made?" And at that time my secretary had gone home, I believe—yes, my secretary had gone home then, and so I said, "I am sorry, but I can't have a copy made, but you can make a copy yourself if you want to." So I gave him a pad of paper and he copied it. That is,—he copied it, yes. I think he copied it just as it is.

Q. It appeared, so far as you could tell, he was copying the letter? A. Yes.

Q. Did he take some time to do that?

A. Yes, he did. He took probably five minutes to copy it.

(Testimony of John J. McAuliffe.)

Q. I see. Then what happened?

A. Well, that appeared to end the thing, because, I think I made the next remark. I asked him to check out his tools that evening.

Q. I see. What did he say about that?

A. He said, "All right." That was all there was to it.

Q. Anything else said in the conversation?

A. No, nothing at all.

Q. Now, tell me specifically, did you say to Mr. Scheuermann "I don't think they can make it stick"? [609]

A. No, I made no such statement.

Q. Did you make any statement similar to that?

A. No, I did not.

Q. Did you point out to him specific provisions of the contract? A. No, I didn't.

Q. Did you show him Section two and point out certain lines and ask him about certain lines in the contract or point them out to him?

A. No, I did not.

Q. Do you recall anything else that he said in the conversation? A. No, I don't.

Q. Did he tell you during the conversation that he had been fined and expelled from the I. A. M.?

A. No, he didn't.

Q. When did you talk to Mr.—did he leave then?

A. He left then, yes.

Q. When did you talk with him again?

(Testimony of John J. McAuliffe.)

A. Well, Mr. Scheuermann called me that night at my home. He said that he had been having difficulty in making his tool checks check with the tools that were charged out to him, and that he thought it would—he could probably do a better job in the daytime when there were more people there. That is, when there were more people in the tool crib to handle the [610] matter, and I agreed with him, that probably that was the case and it would be all right for him to return the next day to take care of the matter.

Q. About what time was it when he called you?

A. It seemed to me that was about eight o'clock.

Q. Was that the entire conversation?

A. Well, he did remark that somebody was going to come down to pick him up at the plant, and the impression I got was that he wanted to leave at that time, immediately.

* * *

A. Well, they were giving us an argument on them. They didn't think these men should be laid off.

Q. What did they say?

A. Well, they said they had too much seniority. They didn't think they should be laid off because we were laying them off out of seniority.

Q. And what did you say about it?

A. I told them that they were not proficient in their work to the extent that other men who had less seniority were and therefore we wanted to keep

(Testimony of John J. McAuliffe.)

the other men. That is, the men who had less seniority.

Q. I see. For that reason?

A. That's right.

Q. How long did you talk to Mr. Schwartz and Mr. Sohm about it?

A. I remember the conversation took place in the conference room opposite the office there. I remember that distinctly.

Q. That is, opposite your office?

A. Beg pardon?

Q. Opposite your office?

A. No, it is really opposite Culbertson's office. It is across the hall, down the hall just a little bit from my office, and I remember distinctly the conversation took place there. Now, how long it lasted —as I remember, it was [618] some time because we were given quite an argument on these two men because they had such long seniority. I'd say it was three-quarters of an hour.

Q. All right. Was the Union, or, were the Union representatives satisfied with your answers?

A. No, they weren't satisfied when we got through.

Q. I see. Did you write the statement on these two cards appearing after the numeral 2 and above your name?

A. That's right. I did on that one (indicating.)

Mr. Bamford: Which one is the witness referring to?

(Testimony of John J. McAuliffe.)

Mr. Holmes: He referred to Exhibit 5.

The Witness: I did on both of them, yes.

Q. (By Mr. Holmes): On both of them?

A. Yes.

Q. And did you do it on both at the same time?

A. Yes, I did them both at the same time, yes.

Q. And then what did you do with the cards?

A. Well, I wrote that on and signed my name and date and turned it back to—turned them back to Carl Schwartz. That is our usual routine.

Q. That is your usual routine? A. Yes.

Q. Was there another card attached to the bottom of it?

A. Yes, there was. I don't know—yes, there was a Union copy and a management copy. [619]

Q. This is just the management copy?

A. Yes. They were both together when I looked at them.

* * *

Q. Going back for a moment to the conversation tion you had with [620] Mr. Scheuermann in your office, did you state in that conversation that in your opinion you didn't think it was quite right for Scheuermann to be discharged?

A. I did not.

Q. In that conversation did you state that you or Mr. Goodenough had asked the Union the three necessary questions?

* * *

(Testimony of John J. McAuliffe.)

Cross-Examination

By Mr. McGraw: [621]

* * *

Q. Now, prior to the time that you talked with Scheuermann about his termination under the Union's letter of request, did you know that Scheuermann had been expelled from the I. A. M.?

A. No, I did not. I don't think I did. That is—no, I am sure I didn't.

Q. Had you heard that he had been in trouble with the Union?

A. Well, yes I had, yes. He had been in trouble with the Union, yes.

Q. Is that why you asked him to see his lawyer or why you suggested he see his lawyer?

A. Yes, I think probably that is true, yes.

Q. But he didn't mention what that trouble was in his discussion with you?

A. No, he didn't. We didn't go into it at all, you know. [625]

* * *

Q. (By Mr. Bamford): Did you know that Scheuermann was a valuable worker?

A. He is a good man, yes. Now, there are other men better than Scheuermann there, but he is a good man. [627]

* * *

Q. (By Mr. Bamford): I believe you said you showed Scheuermann the letter, is that right?

A. That's right, yes.

(Testimony of John J. McAuliffe.)

Q. Prior to that did you read it to him?

A. No, I did not.

Q. Did you show him the contract? [628]

A. No, I did not.

Q. Did you have a copy of the contract?

A. Yes, I had a copy of the contract. I always have a copy of the contract when we talk to anybody about matters like that.

Q. Were there any questions about the contract?

A. No, there weren't.

Q. Or any discussion about the contract?

A. Except that I told him that he was to be terminated in accordance with the contract, because of non-payment of dues.

Q. I see.

A. But there was no other reference to the contract at that meeting with him.

Q. Well, do you remember what your exact words were?

A. It is quite a while ago, you know.

Q. Yes, I know.

A. Well, let's see. As near as I can remember I said, "We have been requested by the Union to terminate you for non-payment of dues, in accordance with the contract." As near as I can remember those are my exact words.

Q. You didn't say anything about initiation fees, is that correct, to Scheuermann?

A. No—I don't know—I said "dues"; that is all I said as I remember it. [629]

* * *

(Testimony of John J. McAuliffe.)

Q. Yes. Was that your interpretation of the contract, that the employees just had to pay their dues to the Union; is that correct?

A. I don't think I knew, to tell you the truth. It seems to me dues—to be truthful, it seems to me it would include both initiation fees and dues, if there were such a thing. I don't know, really. I said "dues" and what I meant by it was any payments that he was supposed to make to the Union. That is what I meant when I said "dues." [630]

* * *

Q. Well, at any time.

A. At any time—I don't remember. We had many of these cases, you know, and it just doesn't stand out clearly in my mind. That is, many Union matters, so it just doesn't stand out clearly in my mind that I had any talk with any Union representative later on it. [632]

* * *

Q. Now, when you state that Pachorik's name was on a termination list, did you mean on a tentative list or on a final list?

A. That was on a tentative list. The reason I remember that particularly was because our work in the large lathe department was getting way down, so I remember particularly that we'd only be left with a very few men in that department; that is, considering the amount of work we had, you see.

Q. Do you remember what month that occurred in?

(Testimony of John J. McAuliffe.)

A. It was very late in the year of 1949. I know that. I am afraid I couldn't—I am afraid I can't remember. It runs in my mind it was along about December, but maybe I am wrong on that. I could verify that down at the plant.

Q. Had his name appeared on any prior termination list?

A. I can't state that for sure but my impression is that it [636] had not. [637]

* * *

Trial Examiner Parkes: Well, I think the question is clear. If it isn't clear to the witness he can say so.

Do you understand the question, sir?

The Witness: I am afraid I don't yet.

Q. (By Mr. Bamford): Well, during 1949 you were making large scale layoffs, weren't you?

A. That's right, yes.

Q. And in your department?

A. That's right.

Q. Now, do you remember on any occasion where any employee [643] was laid off 30 names out of seniority during the course of one of those layoffs?

A. For any reason, 30 names——

Q. During the course of the layoffs, for lack of work?

Mr. McGraw: I am confused now. I thought I knew what he was talking about. Do you mean that he was jumped 30 names so that you could keep him, or that 30 people were involved?

(Testimony of John J. McAuliffe.)

Mr. Bamford: Well, I said laid off rather than skipped over. It seems to me that the question was clear.

Q. (By Mr. Bamford): Do you understand what I am getting at, Mr. Witness?

A. Well, it seems to me——

Mr. Holmes: Do you?

Mr. Bamford: I think I do.

Mr. Holmes: Well, I don't.

A. (Continuing): You go down the list 30 names and then you pick out somebody and lay them off?

Q. (By Mr. Bamford): That's right.

A. Well now, you see there are people who are proficient in certain lines. Take lathe boring mills and so on and so forth. We do, in layoffs, take those people and the seniority in that group is considered and the seniority in the particular group is considered and so forth. That is, you don't take the whole group of people as a group.

Q. I see. You were just taking them department by department? [644]

A. It is really that, yes. Now, I mentioned the big lathes. Well, that is a department, and usually people that operate the big lathes don't operate the other tools, you see, or are not proficient at the other tools. They might be able to operate them, but they aren't proficient at the other tools.

Q. Well, what was Marovich's job at the time he was laid off?

(Testimony of John J. McAuliffe.)

A. To be truthful, I don't know; at the time he was laid off—I don't know.

Q. In the grievance meeting that you had with Schwartz and Gorham was there—did you have a seniority list as a bottom to the conversation or did the seniority list appear during the conversation?

A. I don't remember it, but I think it must have because we must have discussed that, you see. I don't remember it particularly.

Then I would take it from that answer that you don't remember how far down the plant seniority list Marovich's name appeared, is that correct?

A. No, I don't.

Q. Well, what is your—prior to the interview concerning the termination of Marovich with Gorham and Schwartz, before that interview did you talk——

Mr. Holmes: I think that misstates——

A. I don't think Gorham was there. It wasn't Gorham.

Q. (By Mr. Bamford): Oh, I am sorry. It was Carl Sohm? [645]

A. Sohm and Schwartz; that is the way I remember it, yes.

Q. That was inadvertent. Prior to the interview with Schwartz and Sohm, then, did you talk the matter over with Shields or with any of Marovich's supervisors?

A. Well, I don't remember doing it, no. I don't remember doing it but I'd say I did. That is, I don't remember it, no.

(Testimony of John J. McAuliffe.)

Q. Was it your custom to talk——

A. Yes.

Q. I see.

Was it your understanding that Marovich and Ashton were being discharged during the course of a layoff?

Mr. Holmes: That is objected to. He stated the reason for the discharge or termination of those two men. I think the question has been adequately asked and answered before.

Trial Examiner Parkes: Overruled.

A. They were primarily terminated for their inability to meet production requirements. It was during a period, however, when work was very slow.

Q. (By Mr. Bamford): But the emphasis was —in the grievance was that they were actually being discharged because of incompetence rather than in the course of a layoff, is that right?

A. Yes, I'd say so.

Q. Now, as I understand it, your signature on Company's Exhibit 6, the grievance, is in reference to the statement [646] in Section 2, is that correct? [647]

* * *

A. Well, of course you understand I put the pressure on Shields to get production out, to meet production requirements, meet time values we set, and we quite often discuss various people from that viewpoint with regard to their ability to get out production requirements, and I remember—and I couldn't pick out the particular times but I remem-

(Testimony of John J. McAuliffe.)

ber Marovich's name coming up occasionally as not being able to meet production requirements.

Q. And when was the first such occasion?

A. I can't truthfully say when the first occasion was. My impression was it was a number of months ahead of this, six months probably, at least six months.

Q. And so between the time—between six months before his termination and two months before his termination, at least on two occasions and perhaps more you spoke with Shields about Marovich's work, is that correct?

A. That's right, yes. I'd say that was right. [648]

* * *

THOMAS P. SHIELDS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [665]

* * *

Q. All right. Do you recall whether during the, say, the second half of 1949 there were a great many layoffs at the plant? A. Yes.

Q. Were some of them in your department?

A. They were.

Q. A large number of them, compared to the number of men you had?

(Testimony of Thomas P. Shields.)

A. Yes, the percentage was rather high. [666]

Q. Approximately what percentage?

A. I'd say during the whole of '49—I'd say we reduced the force to 30 per cent of what it had been.

Q. You reduced it by 70 per cent then, is that correct? A. In that neighborhood.

Q. During the period you were laying off men, what were the considerations given in the laying off of any particular individual?

A. Seniority, ability to perform work—and that is about it.

Q. Did the particular type of work available have anything to do with it? A. Yes.

Q. During that period do you recall ever attending a meeting concerning layoffs in Mr. McAuliffe's office at any time when he was not present at the meeting? A. Yes, I do.

Q. How many such meetings?

A. I remember only one.

Q. Do you know about when it was?

A. In the early part of September, 1949.

Q. Do you recall who was present?

A. Mr. Buckingham, Mr. Hoffman——

Mr. Bamford: Does the witness mean Mr. Huffman?

The Witness: Huffman, yes.

Mr. Bamford: Thank you. [667]

A. (Continuing)——Mr. Harrison, Mr. Gorham, and later on in the meeting Mr. Kerm Clark and Mr. Ghiorso.

* * *

(Testimony of Thomas P. Shields.)

A. Yes, in the Mechanical Division, and it was to discuss whether we should go on a shorter work week or lay off men or transfer them to another division, a discussion along that line, and I also had to lay off some men.

Q. In the course of that meeting did Mr. Goodenough ever say this: "Mr. Gorham is here and has a few words to say." Did he ever introduce Mr. Gorham to speak in that manner or in any manner similar to that?

A. Not that I remember.

Q. Did Mr. Gorham ever say: "Now that the contract is buttoned up I want you to do something for me, and that is get rid of four men; Floyd King, Pachorik, Clyde Scheuermann and John Marovich"? A. No.

Mr. Bamford: Suppose we ask the witness what he does [668] remember about the meeting.

Mr. Holmes: Just a moment. I am conducting this examination.

Trial Examiner Parkes: I think the question is proper.

Q. (By Mr. Holmes): Did Mr. Gorham make any statements similar to that? A. No.

Q. Did he ask that anybody, any particular individual, be discharged or gotten rid of or terminated?

A. No.

Q. Do you know whether Mr. Gorham left the meeting before it was over? A. He did.

Q. Did Mr. Goodenough, after Mr. Gorham left the meeting, say anything like this: "Frank" or

(Testimony of Thomas P. Shields.)

"Mr. Gorham has been a good boy about signing this contract and I think we ought to see what we can do for him"? A. No.

Q. Did he say anything similar to that?

A. No.

Q. Did Mr. Goodenough suggest that anybody state how or in what manner or by what excuse any particular individual could be gotten rid of or terminated? A. How is that again, please?

Q. Did Mr. Goodenough ask anybody to state what grounds or [669] what excuse he might have for terminating anybody? A. No.

Q. All right. Was anything discussed in this meeting besides the question of work for the welders and the short week or laying off of welders?

A. Yes.

Q. What was discussed?

A. We discussed the laying off of some machinists and transfer—laying off and transfer.

Q. And did that directly affect your department?

A. Yes.

Q. What was said in regard to the laying off or transfer of machinists?

A. We discussed the laying off of Mr. Marovich——

Mr. Bamford: Just a minute. I move that that answer be stricken.

Mr. Holmes: On what ground, please?

Mr. Bamford: On the ground that the best evidence of what occurred at that meeting would be who said what, why and how.

(Testimony of Thomas P. Shields.)

Mr. Holmes: The best evidence rule refers to written documents, Mr. Bamford.

Mr. Bamford: Well, that happens to be an incorrect statement of the law. I would like to know how the conversation started, by whom, and what was said by whom. [670]

Trial Examiner Parkes: I take it you will go into that on your cross-examination; Counsel may proceed.

Mr. Holmes: Ad infinitum, no doubt.

Would you read the question again, please. [671]

* * *

A. Mr. Buckingham was acting in Mr. McAuliffe's capacity. He would have, at that time, been their supervisor in Mr. McAuliffe's place.

Q. He held a supervisory position above yours?

A. That is correct.

Q. Was the name of Floyd King mentioned in that meeting? A. No.

Q. Was the name of Charles V. "Pat" Pachorik mentioned in that meeting? A. No.

Q. Was the name of Clyde W. Scheuermann mentioned in that meeting?

A. Not to my knowledge.

Q. Was anything else discussed in that meeting?

A. I don't think so; not that I remember.

Q. About how long did it last altogether?

A. Probably about two hours.

Q. Were the Union representatives present when Mr. Marovich and Mr. Ashton were mentioned?

(Testimony of Thomas P. Shields.)

A. No. At that time Mr. Buckingham, Mr. Goodenough, I believe Mr. Harrison and myself were the only ones present.

Q. Now, did you attend any other meetings in Mr. McAuliffe's [672] office during the latter half of 1949 when he was absent?

A. Not when he was absent.

Q. That is the only meeting you were at when he was absent, is that correct—in his office?

A. No. We have a weekly production meeting, at which time Mr. Buckingham, who of course would make out the production report for that week—Mr. Buckingham, Mr. Dornbush and myself were present.

Q. Who is Mr. Dornbush?

A. Mr. Dornbush is production control supervisor.

Q. And did you have some of these meetings in Mr. McAuliffe's office in his absence?

A. One.

Q. Anybody else present other than those four individuals? A. No.

Q. You say "No"? A. Three.

Q. Three other than yourself?

A. Mr. Buckingham, Mr. Dornbush and myself.

Q. Oh, I beg your pardon. Nobody else was present at that other meeting? A. No.

Q. Upon what basis did you state that Mr. Marovich and Mr. Ashton were not efficient workmen?

A. Comparison of their work with the—with other people [673] doing the same type of work.

(Testimony of Thomas P. Shields.)

Q. What type of work were they doing, do you recall?

A. Mr. Marovich was about 90 per cent of the time, I'd say, running large horizontal boring mill. The other ten per cent would have been on small horizontal boring mills. [674]

* * *

Q. Did you compare Mr. Ashton's production with other individuals'? A. Yes.

Q. When had you done this, over what period?

A. A four months' period, from May until September.

Q. When you cut down the forces in your department was it necessary that you keep the men who produced more? A. Yes.

Q. Did you ever talk to anybody about Mr. Marovich, his lack of efficiency? A. Yes.

Q. To whom? A. To his leaderman.

Q. Who was that? A. Johns; Mr. Johns.

Q. What is his first name? [675]

A. Wes, Wesley.

Q. And when did this conversation take place, or where there more than one?

A. Oh, there were conversations at various times. If a man is not producing we go first to talk to his leaderman and ask him what is the matter with the fellow, why he isn't getting anything done, and the leaderman goes out and trys to help him out, show him how to do better.

Q. And did you talk to Mr. Johns?

(Testimony of Thomas P. Shields.)

A. Yes.

Q. And what did he tell you?

A. He told me that he was slow.

Q. How many times did you talk to Mr. Johns about him? A. Oh, perhaps half a dozen.

Q. What period was that in?

A. From May until September.

Q. Did you mention this matter to anybody else?

A. Yes.

Q. To whom? A. To Mr. McAuliffe.

Q. Do you know when?

A. I can't recall exactly when. It was probably several times.

Q. You are certain you did mention it to him?

A. Yes. [676]

Q. All right. Did he tell you to—strike that. What did he tell you?

A. I don't recall that he recommended anything specifically, in Mr. Marovich's case.

Q. Did you have authority to take whatever action you thought was necessary? A. Yes.

Q. Did you have the duty to do whatever you thought was necessary? A. Yes.

Q. Then you brought it up at this meeting that you referred to? A. Yes.

Q. During this period when layoffs were taking place—I think that has been identified in this record once or twice before as being in the summer or fall of 1949—were there various termination lists?

A. There were.

Q. Did you prepare some yourself?

(Testimony of Thomas P. Shields.)

A. Yes.

Q. Were they in tentative form or final form when you prepared them?

A. I would prepare them in tentative form.

Q. And was action taken by other people on them? A. Yes. [677]

Q. Did you discuss individuals in connection with the tentative lists you prepared?

Mr. Bamford: May I have the question, please.

Mr. Holmes: I will withdraw the question. It may not be quite clear.

Q. (By Mr. Holmes): Did you discuss the capabilities of various individuals in connection with your termination lists? A. Yes.

Q. I am speaking generally, not of Mr. Marovich, but of various individuals in your department.

A. Yes, we discussed their capabilities.

Q. Was that a practice? A. It was.

Q. Do you know Mr. Charles V. "Pat" Pachorik? A. I do.

Q. Did you ever tell Mr. Pachorik that his name was on a termination list?

A. Mr. Pachorik's name was on a tentative termination list. [678]

* * *

Cross-Examination

By Mr. McGraw: [681]

* * *

Mr. Bamford: I am sorry. I haven't been precise in my terminology. Thank you, Mr. Examiner.

(Testimony of Thomas P. Shields.)

Q. (By Mr. Bamford): Had you ever discussed laying them off out of seniority before?

A. I believe I had discussed it before with Mr. McAuliffe.

Q. Both of them? A. Yes.

Q. When?

A. I don't remember the date. I do remember what he told me, and that was that due to the fact that there was no contract with any Union at that time we should not lay them off, due to the fact they had no representation and that it would look as though we were trying to get rid of them during the most favorable time to us.

Q. That was prior, then, to—do you remember the representation election in July, 1949?

A. Yes.

Q. This was prior to that time, then, is that correct? [691]

A. It was during the time that there was no contract in effect, or no representation. [692]

* * *

Q. And what was said and by whom at that meeting, as best you can remember?

A. The Union representatives objected to the layoff of Mr. Marovich and Mr. Ashton. Both cases were discussed at that time. As to just what was said, I don't recall.

Q. Did you speak at the meeting yourself?

A. Yes. [725]

* * *

SHELDON B. HUFFMAN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [735]

* * *

Q. Were you employed during the last half of last year by Westinghouse? A. Yes, sir.

Q. And in what capacity were you employed at that time?

A. Foreman of the Welding and Fabrication Department.

Q. And did you hold that position as Foreman of the Welding and Fabrication Department during the entire second half of 1949? A. Yes, sir.

Q. Do you recall attending a meeting in Mr. McAuliffe's office sometime in the fall of 1949 at which time Mr. McAuliffe was absent, but at which time certain other supervisors were present and certain Union representatives were present?

Mr. Bamford: Just a minute.

A. I recall——

Mr. Bamford: Just a minute, Mr. Huffman. I may be making an objection at the wrong time, but——

Trial Examiner Parkes: Go ahead. If you have an objection, make it.

Mr. Bamford: Go ahead. I am sorry.

Q. (By Mr. Holmes): Do you recall the question now?

(Testimony of Sheldon B. Huffman.)

A. I recall attending a meeting in Mr. McAuliffe's office when he was absent.

Q. Do you recall who was at the meeting. [736]

A. I don't know whether I'd be able to name all the people present or not.

Q. Well, name as many as you can, will you, please?

A. Now, Mr. Buckingham was there; I believe Mr. Clark, Superintendent of the Electrical Division; Mr. Ghiorso, the Foreman of the Electrical Division Welding Shop.

Q. All right.

A. And inasmuch as I was interested in my own welding problem, I really don't know how many foremen were present.

Q. Were there others present?

A. There were others present, but I don't know just who.

Q. Do you remember whether there were any Union representatives present?

A. I remember Mr. Gorham was present at one of the meetings there. Whether this was the one, I couldn't say. We discussed—talked about laying off welders with Mr. Buckingham.

Mr. Bamford: Mr. Examiner, I move to strike the testimony of this witness and object to the introduction of any more evidence through this witness with respect to this meeting on that ground that it is irrelevant to the proceedings raised by the pleadings in this case.

Trial Examiner Parkes: It is my recollection

(Testimony of Sheldon B. Huffman.)

that the testimony so far seems to be directed toward the meeting which Mrs. Andersen gave testimony about and which was the jumping off point for all these amendments. [737]

Mr. Bamford: That is true, but Mrs. Andersen didn't testify about Mr. Huffman attending that meeting.

Mr. Holmes: That is quite true but that doesn't mean he wasn't there, though.

Trial Examiner Parkes: That may be true too.

Mr. Bamford: As I understand that meeting, the testimony so far of the Company has indicated that there was a meeting about the time of a meeting that Mrs. Andersen testified to, which took place in Mr. McAuliffe's office. Mrs. Andersen was not questioned about any other meetings which took place in that office, and it is quite conceivable, of course, that other meetings did take place in Mr. McAuliffe's office while Mr. McAuliffe was gone. She didn't testify Mr. Huffman attended the meeting and the Company's testimony so far indicates Mr. Huffman left the meeting when allegedly the discharge of Marovich and Ashton were discussed. Hence, I can't see its relevance.

Trial Examiner Parkes: Well, I think your position is untenable. The objection is overruled, motion denied.

Mr. Holmes: Can you find the last question. Mr. Reporter?

(Question and answer read.)

(Testimony of Sheldon B. Huffman.)

Q. (By Mr. Holmes): Do you remember whether any other Union representatives were there?

A. I never did do any business with any Union representatives except Mr. Gorham. [738]

Q. I see. Now, what was the purpose of this meeting?

A. The purpose of the meeting that I attended with Mr. Buckingham and these gentlemen I named was the purpose of—that is, laying off some men or placing some men because my work hours and load was down. I had a surplus of men for the amount of working hours I had on my books.

Q. And your men were what—welders?

A. Welders.

Q. Now, why were Mr. Clark and Mr. Ghiorso in the meeting? A. Why were they in?

Q. Yes.

A. Well, as I recall at that time I was told that there was some seniority in the picture and, well, as I remember at that time I had a pretty large crew and I was under the impression, or it looked like my men perhaps had seniority over some of the men in the other fabrication department, and there was a possibility of maybe the men going over there rather than being laid off.

Q. Now, your department was in what building?

A. My department was in Building 31. My department is N-23, Building 31.

Q. And what building were Mr. Ghiorso's welders in?

(Testimony of Sheldon B. Huffman.)

A. He is in Building 61, in the Electrical Division.

Q. And that is under Mr. Clark?

A. Mr. Clark is the Superintendent of that department, that [739] division, I believe.

* * *

Q. I am not certain it happened. Someone has testified to it. I am asking if you recall it.

Do you recall in this meeting in Mr. McAuliffe's office when he was absent whether Mr. Gorham or any other Union representative said anything similar to this or to this effect: "Now that the contract is buttoned up, we want you to do one more thing," or, "I want you to do one more thing, and that is get rid of four men; Floyd King, 'Pat' Pachorik, Clyde Scheuermann and John Marovich"?

A. I can truthfully say I never heard that.

Q. Or anything like it? A. No. [740]

Q. Did Mr. Goodenough say anything similar to the following: "Frank" or "Mr. Gorham has been a good boy about signing this contract and we ought to see what we can do for him"?

A. I never heard anything like that.

Q. Now, while you were at this meeting was any mention made of the name of Floyd King?

A. King?

Q. King. A. I never heard it.

Q. While you were there was any mention made of the name of Clyde Scheuermann?

A. I don't believe so. I don't know that name. German?

(Testimony of Sheldon B. Huffman.)

Q. Scheuermann. A. Scheuermann—no.

Q. While you were there was any mention made of the name of Mr. Pachorik, "Pat" Pachorik or Charles V. Pachorik?

A. Don't recall that.

Q. While you were at the meeting do you recall any mention made of the name of John Marovich?

A. No, sir.

Q. Now after you—or did you leave the meeting while some individuals were still there?

A. Well, as I remember when the meeting was dismissed—I don't know if it was dismissed. Some was dismissed. I got up and left the room with some other people. As well as I [741] recall there were some people left in the room. I don't know who. [742]

* * *

KERMIT J. CLARK

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [750]

* * *

Q. Do you know whether the meeting had been in progress before you got there or continued after you left?

A. The meeting was in progress before I got there and I don't recall whether it broke up when I left or not.

(Testimony of Kermit J. Clark.)

Q. I see. Was any other subject other than the layoff or the transfer of welders discussed while you were there? A. No.

Q. Was the name of Floyd King mentioned in that meeting? A. No.

Q. Was the name of Clyde Scheuermann mentioned in that meeting? A. No.

Q. Was the name of Charles V. "Pat" Pachorik mentioned in [752] that meeting? A. No.

Q. Was the name of John Marovich mentioned in that meeting? A. No.

Q. Do you recall Mr. Gorham making any statement similar to the following: "Now that the contract is buttoned up there is just one more thing I want you to do, and that is get rid of four men; Floyd King, Pachorik, Clyde Scheuermann and John Marovich"? A. No, I do not.

Q. Do you recall Mr. Goodenough making any statement similar to the following: "Gorham has been a good boy about signing this contract and we ought to see what we can do for him"?

A. No.

Q. Or anything similar to that?

A. Nothing at all along that line.

Q. Did any Union representative suggest or request that any particular individuals be terminated or released or discharged or laid off? A. No.

Q. Did any supervisor while you were at the meeting suggest or request that any particular individual be released or terminated or laid off—while you were in the meeting? A. No.

(Testimony of Kermit J. Clark.)

Q. Now, do you know a Mrs. Chloe Andersen? [753]

A. I would recognize her face; now that she has been pointed out to me and described, I know who she is. Otherwise I wouldn't recognize her by her name. [754]

* * *

W. H. HARRISON

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [755]

* * *

Q. Anybody else you recall? A. No.

Q. Now, what was discussed or—Strike that, please.

Do you recall the approximate time of this third meeting?

A. No, I don't. I don't recall the time of it.

Q. Can you place it as to month? A. No.

Q. You are certain it was during the latter half of 1949? A. Yes.

Q. What was the subject discussed at this third meeting you have spoken of?

A. Well, I came in—the meeting was assembled when I came in and they were discussing welders, the possibility of welders being transferred to 61, and later on the problem of decrease in the shop came up and there was a discussion of whether I

(Testimony of W. H. Harrison.)

could take anybody in the shop; and Marovich and Ashton's names came up. Tommy brought them up.

Q. When you say "the shop," you mean the machine shop? A. That is correct.

Q. As separate from the question of transferring welders? A. Correct.

Q. You say Marovich and Ashton were brought up by Shields? A. Yes.

Q. Do you recall what he said with respect to them?

A. Well, he said he didn't feel that they were producing [759] and doing the job in the shop, and Buck turned to me—I believe it was Buck—and stated that he wondered if they could be used on maintenance and I said no, because I felt that Marovich couldn't do the maintenance work, and Ashton had been on maintenance and had flopped on it and I just said no, that I didn't think either one of them could do maintenance work.

Q. Was anything else said with respect to those two individuals in the meeting?

A. Not to my knowledge.

Q. Was the name of Floyd King mentioned in the meeting? A. Not to my knowledge.

Q. Was the name of Clyde Scheuermann mentioned in the meeting?

A. No, not to my knowldge.

Q. Was the name of Charles V. "Pat" Pachorik mentioned in the meeting?

A. Not to my knowledge.

(Testimony of W. H. Harrison.)

Q. Do you recall Mr. Gorham making any statement similar to the following: "Now that the contract has been buttoned up there is just one more thing I want you to do for me, and that is get rid of four men; Floyd King, "Pat" Pachorik, Clyde Scheuermann and John Marovich"?

A. Not to my knowledge.

Q. Did any Union representative make any statement similar to that?

A. Not to my knowledge. [760]

Q. Did Mr. Goodenough state anything similar to the following: "Frank" or "Mr. Gorham has been a good boy about signing this contract and we ought to see what we can do for him," or anything similar to that?

A. Not to my knowledge. [761]

* * *

WILLIAM H. KELLY

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes:

* * *

A. It was all in this same general layoff. I couldn't say whether it was a month before or after. I couldn't pin it down as to time. I could check it.

Q. You say it was in this general period?

A. Yes, it was in that general layoff period.

(Testimony of William H. Kelly.)

Q. Do you recall the conversation with Mr. Pachorik? A. I do.

Q. Would you state it as well as you can remember, please?

A. The conversation with him was that it was my understanding when the list was gone over that he would be retained because of his special ability out of seniority, and his termination, notification of his termination came as a surprise to me because I thought it was understood that he would not be laid off, and that I was sorry they had notified him because I didn't think the intention was to lay him off, but I would find out.

Q. Did he tell you that he had been notified he was to be terminated?

A. Yes, he told me he had been notified verbally that he was on the layoff list.

Q. Did he tell you who had notified him?

A. If he did I don't remember. I presume it would be his supervisor.

Q. That is your assumption, is that correct?

A. Yes. It was official; whoever told him had the right to [771] tell him, so that is the impression I got from the fact he was in there. He was not on the list to be laid off at the time I went over this list in the beginning, before any of them were notified. It was my understanding that Pachorik would not be put on the actual layoff list. [772]

* * *

HERBERT CRANE BUCKINGHAM

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [804]

* * *

Q. Did you call him in? A. I did.

Q. Did he come in?

A. He attended the meeting.

Q. All right.

A. Well, then we brought up several names. I don't recall any particular list of names. And then it boiled down to two people that Mr. Shields discussed with me.

Q. Who were those two?

A. One was a man by the name of Ashton and the other was John Marovich.

Q. What was said with respect to those two?

A. Well, we brought them up to Mr. Harrison's attention, concerning Ashton first, and it seems that there was some question about Ashton being able to perform this job. I just don't recall the intent, other than the fact he wasn't capable of doing this particular job; and then Marovich was mentioned and his name—well, he had been a machine hand. Shields [807] brought up the point that it seemed that Johnny, although doing a fairly good job, wasn't making his time and where some of the other fellows who he thought didn't have quite the seniority Johnny did—those particular individuals were

(Testimony of Herbert Crane Buckingham.)

turning out more work and that he would sooner keep—now, I don't know the names—and Marovich was discussed for quite some time.

Q. What did he say in comparing these other individuals with Marovich?

A. Well, he said that—it seemed that they—in other words, we were getting to the point where he had to make out on these jobs. In other words, our time cards were marked with a certain limit on them and we had to make it, and at that time some of these individuals were making the limits and doing better. And Shields brought up the problem that although Johnny was doing a fairly good job he wasn't making his time and that was—but at that time that decision, I think—I mean the finality of that discussion—that was the finality of that discussion concerning Johnny at that time.

Q. "Making time" meant what?

A. Producing the job in the time allowed by our methods people.

Q. All right. Was anything else said that you recall?

A. No. I think—to my mind that was about all that I can recall. The meeting came to an end because we had been in there quite a while and we didn't like to keep the fellows off [808] the floor and as soon as possible we went back on the job.

Q. Were any Union representatives there?

A. I am trying to visualize the facts, whether they were or not. I don't recall whether there was

(Testimony of Herbert Crane Buckingham.)

or not. Somehow I kind of think Frank was there for a short while but I couldn't say definitely.

Q. Frank who? A. Frank Gorham.

Q. So you don't know definitely whether he was or not? A. I do not, that's right.

Q. To your recollection did any Union representative make a request or a demand or a suggestion in that meeting that any particular individual be terminated? A. No, not to my knowledge.

Q. Was the name of Floyd King mentioned in that meeting?

A. It seems that the fact is that his name was mentioned, that he had just been recently, if I am not mistaken, transferred to another department, but that is all that I can recall of hearing of him. We were going through the people who had been transferred from the Mechanical Division to this repair section and there was several around that time who had been transferred. If I am not mistaken King's name was mentioned at that time but that is all.

Q. Was the name of Pachorik mentioned?

A. No, sir; not to my knowledge. [809]

Q. Was the name of Clyde Scheuermann mentioned? A. No, sir.

Q. Now, in that meeting do you recall Mr. Gorham or any other Union representative saying anything like this: "Now that the contract is buttoned up there is just one more thing you can do for us and that is get rid of four people; Floyd King, Pachorik, Clyde Scheuermann and John Marovich."

(Testimony of Herbert Crane Buckingham.)

A. Absolutely no. I don't remember Frank Gorham being there.

Q. Well, did any other Union representative say anything like that? A. No, sir, absolutely not.

Q. Was Mr. Goodenough there?

A. Yes, I think he came down and sat in there and listened to the proceedings.

Q. Now, did Mr. Goodenough make any remark like the following: "Frank" or "Mr. Gorham" or possibly the Union—no, I guess not—strike that, please.

"Frank" or "Mr. Gorham" one or the other, whichever name he may have used, "has been a good boy about signing the contract and we ought to see what we can do for him"? [810]

* * *

WESLEY JOHNS

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [830]

* * *

Q. Did you check his work as to time values?

A. Yes.

Q. Would you state what you found in checking Mr. Marovich's work?

A. I found that Johnny Marovich's work, according to the time values and the precedent established through other workmen in the shop was low.

(Testimony of Wesley Johns.)

Q. Did you compare his work to—or, the output of Mr. Marovich to that of other individuals?

A. Yes.

Q. Do you know what other individuals?

A. Yes.

Q. Were they on the same shift, the swing shift, or what? A. They were on other shifts.

Q. Other shifts? A. Yes. [833]

Q. Could you compare his work to other individuals' on exactly the same machine?

A. On exactly the same machine, yes. [834]

* * *

EMIL TONASCIA

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [865]

* * *

Mr. Bamford: Well, your next question was what the conversation was about. Where, when, who was present?

Q. (By Mr. Holmes): Will you state where the conversation took place? A. Would I say——

Q. Where did it take place?

A. It took place in the department where I was working.

Q. That is, the Pipe Department? A. Yes.

Q. Do you know about when?

(Testimony of Emil Tonascia.)

A. Well, I believe it was about a week or so after we were told that we had won a shop election.

Q. That is, a union shop election?

A. Union shop election, and I——

Q. Just a minute. And who was there?

A. Scheuermann was there. [866]

Q. Anybody else? A. No.

Q. All right. Now, will you tell us what the conversation was about?

A. Yes. I asked Clyde Scheuermann, I said, "Now that the election is—that the shop has won the union election, what effect will that have upon you?" He said, "None whatever. The Taft-Hartley law protects me."

Q. Did you talk to him about that matter afterwards?

A. No. I avoided him at all times, because I didn't want to get into a discussion at all, because it was too deep for me. [867]

* * *

Cross-Examination

By Mr. McGraw:

Q. Mr. Witness, did you find in your association and observation of Mr. Scheuermann that he was well informed about the things that went on in the shop? A. Oh, yes. He was well informed.

Mr. McGraw: That is all.

Q. (By Mr. Bamford): What do you mean by "well informed"?

(Testimony of Emil Tonascia.)

A. He knew everything that was going on.

Q. What do you mean by that "everything that was going on"?

A. He knew everything that was going on in the department, and the shop as well.

Q. You mean he knew what the work was about, is that right? A. How?

Q. By "everything," "everything that was going on," you mean he knew the type of work that was being done?

A. No, regarding union activity.

Q. How do you know that?

A. Well, from what I understand from hearsay among the other [868] fellows.

Q. What other fellows?

A. The other men in the department.

Q. They would tell you that Clyde knew what was going on?

A. They'd come and tell me and I'd say, "Let's forget it; let's get some work done."

Q. What would they tell you?

A. I don't know what they was telling me.

Q. When did they tell you this?

A. Well, when we were working.

Q. Was that prior to Scheuermann's discharge?

A. Yes.

Q. How soon prior to Scheuermann's discharge?

A. Well, within a month or so. No one knew at the time that he was going to be discharged.

Q. Isn't it a fact that Judd was Scheuermann's leaderman prior to his discharge?

(Testimony of Emil Tonascia.)

A. That Judd was?

Q. Yes. A. Yes, I think you are right.

Q. And when did you stop being Scheuermann's leaderman? A. When?

Q. Yes.

A. Oh, I can't say. I recollect, now that you brought that up that he was. I was his leaderman first and then he was [869] transferred over to Judd, you are right.

Q. As a matter of fact, it was quite a while before he was discharged that he was transferred, wasn't it, a couple of months?

A. I wouldn't say a couple of months. Probably a month or so. He wasn't with Judd very long. [870]

* * *

HENRY GROTH

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes: [871]

* * *

Q. Which shift did you work on in the month of October last year?

A. I have always worked day shift.

Q. Do you recall when Les Ollis was laid off?

A. Yes, I do.

Q. Do you remember what month it was?

(Testimony of Henry Groth.)

A. I believe it was in October, September or October.

Q. All right. A. I am not sure.

Q. Do you use the same locker room, or did you use the same locker room in September or October as Mr. Ollis and Mr. Scheuermann and Mr. Smiley?

A. I did.

Q. During either the month of September or October, before Mr. Ollis was laid off, do you recall being in the locker room on any occasion when Mr. Ollis attempted to pay his dues to Mr. Smiley and Mr. Smiley refused to take Mr. Ollis' dues, with a remark something similar to this: "You know I can't take your dues"?

A. No. That I couldn't answer, that I heard that.

Q. Do you recall any occasion——

A. Well, I heard rumors in the plant about it and all that but I did not hear a definite statement.

Q. Do you remember any occasion when you were present when Mr. Ollis attempted to pay his dues to Mr. Smiley? [872] A. No, I do not.

Q. Either in the locker room or anywhere else?

A. Or anywhere else, no. [873]

* * *

ELMER SMILEY

a witness called by and on behalf of the Respondent Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Holmes:

* * *

Q. And were you employed by that Company at that plant during the months of August, September and October of 1949? A. Yes.

Q. As a machinist at that time? A. Yes.

Q. Did you have any position in the Union?

A. Yes. I am a steward and on the Executive Board.

Q. And you were at that time? A. Yes.

Q. Do you know Les Ollis? A. Yes.

Q. During that period, August, September or October, 1949, do you recall any occasion when Mr. Ollis offered to pay to you his Union dues? [877]

A. Yes. He offered to pay me some dues. He came to me and said to me, "Smiley," he says—there wasn't anyone around, this was out on the floor—he said, "Smiley, how about taking some of my dues," and I said, "Ollis, well, there is no use me taking any of your dues. They will send it back."

Q. Do you know when that conversation took place?

A. No, I don't, haven't the slightest idea of the date, no.

Q. Do you know when Les Ollis was laid off?

A. Yes, it wasn't then.

(Testimony of Elmer Smiley.)

Q. Do you know what month he was laid off in?

A. No.

Q. You don't know what month? A. No.

Q. Well, did this conversation take place shortly after or before he was laid off?

A. No, it took place—I believe it took place after he was fined the five hundred dollars, between that time and when he was laid off. It must have been about a month after he was fined, I would say, approximately.

Q. A month after he was fined?

A. Yes, I'd say.

Q. Did he at any other time talk to you about paying his Union dues? A. No.

Q. Is that the only occasion when he talked to you about [878] paying his Union dues?

A. That's right.

Q. Did he ever offer to pay you his Union dues or talk to you about attempting to pay his Union dues in the locker room? A. No.

Q. Did he ever offer to pay his Union dues or attempt to pay his Union dues when Clyde Scheuermann was present? A. No. Definitely no.

Q. Did he ever offer to pay his dues or attempt to pay his dues to you when Scheuermann and Groth were present? Or any other men?

A. No.

Q. Is there any other time but this one instance that you have related——

A. That is the only time.

* * *

(Testimony of Elmer Smiley.)

Cross-Examination

By Mr. Bamford: [879]

* * *

Q. Did you ever speak with Gorham about taking dues from Scheuermann or Ollis?

A. Ollis, yes. I did speak to Frank Gorham and he just—I said, "Frank, Ollis wanted to pay some dues today and I told him there was no use paying any dues," and Frank just [880] nodded his shoulders and that is all that was said, and Frank didn't say a word.

* * *

Q. Do you remember telling me at that time that you had spoken to Gorham about taking dues from Ollis and Scheuermann? A. Yes, I did.

Q. And you told me that Gorham had told you not to take dues from them?

A. Well, that is my fault, I grant you. I didn't mean what I said. I didn't mean how that sounded. In other words, when you wrote it down I said it one way and after reading it, it didn't gibe at all. That is why I told you——

Q. You signed an affidavit, didn't you, to that effect?

A. I signed it, yes, but I told you after that that wasn't the way it actually happened. You don't want me to lie, do you?

Q. No. [881]

A. All right. That is the way it was. If you

(Testimony of Elmer Smiley.)

had a Bible here I'd swear to it that is just the way it happened.

Q. Well, you are under oath, so it is the same thing. A. Well, that's true, too. [882]

* * *

Recross-Examination

By Mr. McGraw:

Q. Mr. Witness, were you ever instructed not to take any dues? A. No.

Q. How many drinks did Mr. Bamford have out there at your home that afternoon?

A. No, I didn't offer any liquor. We were out, to tell you the truth.

Mr. Bamford: I didn't hear that answer.

(Answer read.)

Q. (By Mr. Bamford): Did you read the affidavit over before you signed it?

A. Yes, I did, but you know how that is. You read it and you just glance over it and——

Q. Your wife read it over, too, didn't she?

A. Yes.

Q. And asked you some questions about it?

A. Yes.

Q. Now, about these drinks—how many did you have?

Mr. Holmes: I object to that as being outside the scope [888] of the direct.

Trial Examiner Parkes: Mr. McGraw asked about it.

(Testimony of Elmer Smiley.)

Mr. Holmes: He asked how many Mr. Bamford had, not how many the witness had.

Mr. Bamford: I started to say I overlooked in my cross-examination this matter of the number of drinks he had.

Mr. Holmes: I object to that.

Trial Examiner Parkes: Very well. You may go into the matter.

Mr. Bamford: Thank you. [889]

* * *

FRANKLIN W. GORHAM

recalled as a witness on behalf of the Respondent Union, was examined and testified further as follows:

Direct Examination

By Mr. McGraw: [894]

* * *

Q. And was that the Constitution and Bylaws that were in effect at the time that Mr. Scheuermann was tried and expelled? A. It is.

Mr. McGraw: May we have it marked as IA of M's Exhibit 1?

(Thereupon the document above referred to was marked Respondent Union's Exhibit No. 1 for identification.)

Mr. McGraw: I offer it in evidence.

Mr. Bamford: No objections.

Trial Examiner Parkes: Mr. Holmes, do you have any objection?

Mr. Holmes: No objection.

(Testimony of Franklin W. Gorham.)

Trial Examiner Parkes: IA of M's Exhibit No. 1 is received in evidence.

(The document heretofore marked Respondent Union's Exhibit No. 1 for identification was received in evidence.)

Q. (By Mr. McGraw): Now, Mr. Gorham, since that time have any changes been made in the Constitution and Bylaws? A. Yes. [895]

Q. Can you tell me approximately when they were made?

A. These changes were made effective April 1st, 1949.

Q. And were those changes published and sent to the membership of the IA of M?

A. They were.

Q. And did the membership of the IA of M——

A. They did.

Q. Can you tell us how those changes were given to the members of the IA of M?

A. There was a printed ballot sent by the International Office, sufficient copies to each local lodge for the entire membership.

Q. And were all those changes printed in any of the official organs of the International——

A. The Machinists Journal.

Q. I show you, Mr. Witness, a document and ask you if you can tell us what that is?

A. Yes, this is the Machinists Monthly Journal, February, 1949.

Q. And does that contain the proposed changes to the Constitution and Bylaws? A. It does.

(Testimony of Franklin W. Gorham.)

Q. And will you point out the pages, if you please, it appears on?

A. Pages 62, 63, 64, 65, 87. [896]

Q. And does it also contain the results of the referendum vote? A. It does.

Q. And at what pages do the results appear on?

A. 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85.

Mr. McGraw: May we have that marked as IA of M's exhibit next in order, No. 2?

(Thereupon the document above referred to was marked Respondent Union's Exhibit No. 2 for identification.)

Mr. McGraw: I offer it in evidence for the limited purpose of showing the exact changes that were proposed and voted on as intended to change IA of M's Exhibit No. 1, and to show further that this was the method by which the International Association of Machinists attempted to inform its membership of the status of its Constitution and Bylaws.

Mr. Holmes: No objection.

Mr. Bamford: No objection.

Trial Examiner Parkes: IA of M's Exhibit No. 2 is received in evidence.

(The document heretofore marked Respondent Union's Exhibit No. 2 for identification was received in evidence.)

Q. (By Mr. McGraw): Did further issues of the Monthly Journal contain the changes that were

(Testimony of Franklin W. Gorham.)

voted in by the membership of the [897] referendum vote? A. They did.

Q. And can you tell us how long those—that information was published?

A. I believe it was published during the months of March, April and May.

Q. Now, Mr. Gorham, I show you another document and ask you if you can tell us what it is.

A. Machinists Monthly Journal for April, 1949.

Q. And does that Journal contain the changes that had been voted in by the membership for the Constitution and Bylaws? A. Yes, it does.

Q. Will you tell us on what pages they occur?

A. 170, 171, 172, 173.

Mr. McGraw: May we have this identified as IA of M's Exhibit next in order?

(Thereupon the document above referred to was marked Respondent Union's Exhibit No. 3 for identification.)

Mr. McGraw: I offer it in evidence.

Mr. Bamford: No objection.

Mr. Holmes: No objection.

Trial Examiner Parkes: IA of M's Exhibit No. 3 is received in evidence.

(The document heretofore marked Respondent Union's Exhibit No. 3 for identification was received in evidence.) [898]

Q. (By Mr. McGraw): Now, following the publication in the Journal, Mr. Gorham, did the IA of M make a reprinting of this Constitution and Bylaws? A. They did.

(Testimony of Franklin W. Gorham.)

Q. Now, I show you, if you please, a document and ask if you can tell us what it is.

A. This is the Constitution of the Grand Lodge, District and Local Lodges of the International Association of Machinists amended effective April 1st, 1949.

Q. And is that the one that is now currently in effect? A. It is.

Mr. McGraw: May we have this marked as IA of M's Exhibit No. 4, if you please?

(Thereupon the document above referred to was marked Respondent Union's Exhibit No. 4 for identification.)

Mr. McGraw: I offer it in evidence.

Mr. Holmes: No objections.

Mr. Bamford: No objection.

Trial Examiner Parkes: IA of M's Exhibit No. 4 is received in evidence.

(The document heretofore marked Respondent Union's Exhibit No. 4 for identification was received in evidence.) [899]

* * *

RESPONDENT UNION'S EXHIBIT No. 4

(Portions of)

International Association of Machinists

Constitution

of the Grand Lodge, District and Local Lodges, Councils and Conferences

Revised by the Committee on Law as recommended by the Twenty-Second Convention of

(Testimony of Franklin W. Gorham.)

the Grand Lodge of The International Association of Machinists, held in the City of Grand Rapids, Michigan, September 13 to 24, 1948, and thereafter adopted by referendum vote in the month of December, 1948, effective April 1, 1949.

Grand Lodge
International Association of Machinists

Machinists Building
Washington 1, D. C.

* * *

Article XXV
Membership Conduct and Discipline

* * *

Penalties

Sec. 2. Any member or members of any local lodge who attempt to inaugurate or encourage secession from the Grand Lodge or any local lodge, or who advocate, encourage, or attempt to inaugurate any dual labor movement, or who violate the provisions of the Constitution of the Grand Lodge, or the Constitution for Local Lodges, or any member who advocates or encourages Communism, Fascism, Nazism, or any other totalitarian philosophy, or who, by other actions gives support to these "philosophies" or "isms," shall, upon conviction thereof, be deemed guilty of conduct unbecoming a member and subject to fine or expulsion, or both.

* * *

(Testimony of Franklin W. Gorham.)

Constitution for Local Lodges
of the
International Association of Machinists

* * *

Reinstatement

Sec. 15. Any person whose membership has been cancelled may be reinstated to membership, but the application for reinstatement must be made to the lodge under whose jurisdiction the applicant is working and the regular reinstatement fee of such lodge must be paid.

If the application for reinstatement is filed in the local lodge wherein the applicant's original membership was cancelled and the application is approved, said lodge shall immediately issue a reinstatement book containing a reinstatement stamp properly cancelled, which transaction shall be entered on the monthly report of said local lodge in the same manner as initiations are entered.

When the application for reinstatement is filed in a local lodge other than that by which the applicant's membership was cancelled, then the application, after having been approved by the local lodge receiving the same, shall be forwarded by the financial secretary of said lodge, together with a fee of two dollars ($2.00), to the General Secretary-Treasurer. Upon receipt of said application the General Secretary-Treasurer will issue a reinstatement book containing a reinstatement stamp properly cancelled, and forward same to the financial secretary of the local lodge from which the appli-

(Testimony of Franklin W. Gorham.)

cation was received, and shall thereupon transfer the reinstated member to such lodge and notify the local lodge wherein the applicant's previous membership was cancelled.

If the membership of the person applying for reinstatement was cancelled for cause other than non-payment of dues, or if there are any unpaid fines, or local, district, or Grand Lodge assessments charged against him, his reinstatement shall not be effected, nor shall his due book be issued until said causes are removed and the fines and assessments are either remitted or paid in full. All applications for reinstatement shall take the usual course.

The foregoing provisions shall not apply to persons whose membership was cancelled in lapsed, suspended, expelled or disbanded lodges. All such persons working in a locality where a local lodge exists, may be reinstated by the Grand Lodge upon making application therefor and paying the reinstatement fee charged by the nearest local lodge, which fee shall not be less than $5.00. The local lodge shall forward the application for reinstatement, together with a fee of $2.00, to the General Secretary-Treasurer.

* * *

Received in evidence September 18, 1950.

Mr. McGraw: May we have this marked as I. A. of M.'s Exhibit No. 5, if you please?

(Thereupon the document above referred to was marked Respondent Union's Exhibit No. 5 for identification.)

(Testimony of Franklin W. Gorham.)

Q. (By Mr. McGraw): I note on the cover of I. A. of M.'s Exhibit No. 5 for identification, Mr. Gorham, that this was approved April 19, 1946. I ask you if these are the Bylaws for Local 504 that have been in effect since that date?

A. They have.

Q. And they were in effect in 1949 when Mr. Scheuermann was tried and expelled? [900]

A. They were.

Mr. McGraw: I offer this in evidence.

Mr. Bamford: No objections.

Mr. Holmes: No objection.

Trial Examiner Parkes: I. A. of M.'s Exhibit No. 5 is received in evidence.

(The document heretofore marked Respondent Union's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. McGraw): Now, Mr. Gorham, I direct your attention to I. A. of M.'s Exhibit No. 1 for—I beg your pardon—to I. A. of M.'s Exhibit No. 4. A. It isn't here.

Q. Will you point out, if you please, those particular sections which deal with the applications for membership, and the eligibility for membership? First the applications for membership.

A. The applications for membership first?

Q. Yes.

A. That is Article E, Section 20, page 81.

Q. And now with respect to the eligibility for membership.

(Testimony of Franklin W. Gorham.)

A. That is Section 1 of Article E.

Q. Still on page 81? A. That's right.

Q. And will you point out the particular section of the [901] Constitution that refers to applications for reinstatement?

A. Section 15 of Article E, pages 85 and 86.

Q. Now, will you also point out, Mr. Witness, if you please, those sections that deal with the trials of members?

A. Article K, page 97; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10. Those are on pages 97, 98, 99, 100, 101, 102.

Mr. Bamford: Just a minute. Counsel, since Mr. Scheuermann was tried under the old Constitution, perhaps you meant to refer the witness' attention to the former Constitution rather than this one.

Mr. McGraw: I hadn't intended to, Counsel, on the theory that the relevant problem here was a question of his readmission, perhaps, and not his trial.

Mr. Bamford: Oh, I see. [902]

* * *

Q. Now, will you tell us just briefly, if you please, what the procedure is in Local 504 for handling applications for membership?

A. You mean making it out or after it is made out?

Q. How do you process——

A. After the application is made out, and made

(Testimony of Franklin W. Gorham.)

out in full, it is presented to the Local Lodge for acception or rejection.

Q. And the Local Lodge votes on it?

A. That's right.

Q. And then, is the member obligated, or what happens?

A. They are initiated after they are voted in.

Q. Now, at the time of the initiation do you furnish new members with a copy of the Constitution and Bylaws? A. Yes.

Q. And also copies of the Local Lodge Bylaws?

A. Yes.

Q. Do you require from each new applicant a pledge that they [904] will abide by the laws of the organization? A. We do.

* * *

Q. Now, to your own knowledge, has Local 504 ever adopted any special laws concerning the reinstatement of Clyde Scheuermann? A. No.

Q. Do you know of any special motions that have been made dealing with this reinstatement?

A. No. [905]

Q. Has it ever been discussed? A. No.

Q. Then, is it fair to say, Mr. Witness, that reinstatement is available to Clyde Scheuermann under the same rules as set forth in the Constitution and Bylaws that are now in evidence?

A. Yes.

Q. Do you know Clyde Scheuermann?

A. I know him when I see him, yes.

Q. How long have you known him?

(Testimony of Franklin W. Gorham.)

A. To my knowledge, approximately a year, a little over.

Q. Between meetings of Lodge 504, who are you responsible to in the performance of your duties?

A. The Executive Board and the District Lodge. The Executive Board of Lodge 504 and the District Lodge.

Q. And are you assigned to service any lodges other than 504?

A. No, not at the present time.

Q. Now, did you ever receive any instructions from the Executive Board of 504 concerning Clyde Scheuermann? A. Once.

Q. Can you tell us when that was?

A. I was instructed to prefer charges against him in, I believe, February of 1949.

Q. And you did? A. I did.

Q. Do you know Henry Smith? [906]

A. Yes. [907]

* * *

Q. Do you know Leslie Ollis? A. I do.

Q. Did you ever prefer charges against him?

A. Yes.

Q. Do you know whether anybody else did or not?

A. There was two or three other members that did.

Q. Did you ever receive any instructions to prefer charges against Leslie Ollis?

A. Yes. I may be a little mixed on this. It

(Testimony of Franklin W. Gorham.)

might be that had—that charges preferred against him by me was under instructions from the Executive Board.

Q. Now, can you tell us when negotiations were completed in 1949 for the contract that finally resulted between Westinghouse and the IA of M?

A. You mean the last day we had any negotiations or when they were accepted?

Q. Now, I am speaking of the last meeting, yes, the last meeting you negotiated with the company and prior to submission to the membership.

A. It was, I believe, the last week in September of 1949.

Q. Do you remember the day? [908]

A. I think it was the 26th, but I am not positive.

Q. And then, following that meeting, did you submit the proposed agreement to the membership?

A. Yes.

Q. Did you call a special meeting for the purpose of considering it? A. Yes.

Q. Can you tell us where this meeting was held?

A. It was held in the Labor Temple in San Jose.

Q. And can you tell us when it was held, what day? A. On October 9th.

Q. And what hour?

A. I believe it was 10:00 o'clock in the morning.

Q. And what day of the week?

A. It was Sunday. [909]

* * *

(Testimony of Franklin W. Gorham.)

Q. Now, did the membership accept or reject the agreement as proposed at this special meeting?

A. Well, it was accepted. There were a couple of—one clause that they had a choice that they themselves made as to the way they wanted it written.

Q. And what clause was that?

A. The Holiday clause.

Q. And did you ultimately change the wording of the Holiday clause to agree with the wishes of the membership? A. Yes.

Q. And when was that done?

A. It was done the following morning.

Q. And it was done before it was signed?

A. Yes. [910]

* * *

Q. Now, at any time during the negotiations did any member of the IA of M's Negotiating Committee discuss the effect of the Security clause, which is now in your contract, on Clyde Scheuermann? A. No.

Q. Did you discuss the effect of that clause on any other individual? A. No.

* * *

Q. Now, after the agreement was signed, on October 10, 1949, [912] did you make any systematic effort to check and determine whether or not employees at Westinghouse were in compliance with the Union Security Provision of the agreement? A. We did.

(Testimony of Franklin W. Gorham.)

Q. Will you tell us how you did that?

A. I obtained a list of our members working—a list of our people in our unit working at Westinghouse from the company and cross-checked them against the records of the union.

Q. What did you find?

A. We found that three people were not in good standing.

Q. And are those the same three people that were named in General Counsel's Exhibit No. 6?

Will you show it to him, please, Mr. Reporter?

(Exhibit shown to witness.)

Mr. McGraw: I have forgotten what the question is now.

Trial Examiner Parkes: Read it back, please.

(Question read.)

The Witness: Yes.

Q. (By Mr. McGraw): And what did you do about it after you discovered that these three were not in membership in accordance with the agreement?

A. We went to the company and asked them to lay them off.

Q. And that is the letter that has been identified now as—in evidence as GC 6? A. Yes. [913]

Q. How did you deliver that letter?

A. I delivered it to Mr. Goodenough personally. I was going out there to a meeting, anyhow. I took it with me rather than send it by registered mail.

(Testimony of Franklin W. Gorham.)

Q. Did you discuss the contents of the letter with Mr. Goodenough when you delivered it?

A. No.

Q. Who was present when you delivered it?

A. I believe Mr. Goodenough, and I believe also Mr. Schwartz. I am not sure whether there was anyone else in the room at the time. We had a meeting shortly thereafter. I went out there to attend a meeting. I just took the letter with me rather than send it by registered mail.

Q. What did Mr. Goodenough say when you handed it to him?

A. He didn't say anything. He read the letter. He said, "All right. We will take care of the matter."

Q. Did you have any discussion with Mr. Goodenough later concerning the contents of that letter?

A. No. You mean, during that meeting?

Q. Yes.

A. No. The only discussion I ever had with him was that he asked me to send him a letter stating that all people had an equal opportunity to become members.

Q. When did he make such a request?

A. I believe it was at the termination of the meeting. [914]

Q. And now, before you wrote this letter, GC 6, did you know, before you started to check up, as to who would be revealed as not being members of the IA of M?

A. I didn't have the slightest idea.

(Testimony of Franklin W. Gorham.)

Q. Now, at any time prior to November 11, 1949, did you ask Mr. Goodenough to discharge Clyde Scheuermann? A. No.

Q. Did you ever ask him to get rid of him?

A. No.

Q. Did you make any such similar request, or did you make a similar request to any official or representative of Westinghouse?

A. I did not.

Q. Now, did you ever have a meeting with Mr. Scheuermann with regard to his termination at Westinghouse?

A. You mean, before he was terminated?

Q. Well, at any time.

A. I had one, after he was terminated, a very brief one.

Q. And did you have any conversations with him at all prior to his termination?

A. I did not.

Q. Prior to his termination did you ever have an application for reinstatement from him?

A. No.

Q. Did he ever speak to you prior to his termination with [915] regard to how he could get back in the union? A. He did not.

Q. Now, how long after his termination was it before you spoke with him?

A. Two or three days.

Q. Can you tell us where this occurred?

A. In our office.

Q. And can you tell us how it happened?

(Testimony of Franklin W. Gorham.)

A. He came to the counter, and I believe he had made an appointment the previous day to come in at a certain time. I went out to talk to him. He told me that he wanted to make an application to join the union. I told him that I was unable to take an application from him because he did not have a job.

Q. And what else was said?

A. I believe that is all that was said that I know of.

Q. Now, when you say you went to see him, will you explain that?

A. Well, I was called out from my own office to the counter to talk to him.

Q. And so you actually talked to him over the counter? A. That's right.

Q. Now, does 504 share its office with any other local?

A. Yes, there is 1101. 1101 is also in that particular office.

Q. And the District Office, as such, uses the same place? [916]

A. It is the District Office. That is what it is. The Local shares the space in the District Office.

Q. Now, when you talked to Mr. Scheuermann, two or three days after his termination, did Mr. Scheuermann offer to pay any dues?

A. No, he did not.

Q. Did he offer to pay any fees? A. No.

Q. Did he ever offer any money whatsoever?

A. He did not.

(Testimony of Franklin W. Gorham.)

Q. Did he ask for any special consideration in order to make payments? A. He did not.

Q. Did he tell you at that time that he had been in a couple of days before and the girl had torn up an application that he had made?

A. I don't remember him saying it, no.

Q. Did any of your employees, at the union office, ever tell you that Mr. Scheuermann had come in and asked for an application?

A. I don't know whether one of the girls told me or whether Mr. Scott told me.

Q. And was Mr. Scott the one who made the appointment for Mr. Scheuermann to come in and see you? A. Yes. [917]

Q. Now, will you tell us, if you please, what your rules are in conducting your union business there by referring persons from one business agent to another?

A. Well, I don't know exactly what you mean. However, any business that one representative has is his business, and any other representative will not attempt to handle it or have anything to do with it. He will refer him to the representative who is taking care of it.

Q. Now, if I understand you correctly, Mr. Gorham, it is that when you are assigned as the business agent to service the members at Westinghouse, that any member or person who comes in from Westinghouse with any problem would be referred to you?

A. That's right.

(Testimony of Franklin W. Gorham.)

Q. And no other business agent will handle it?

A. That's right. Well, Mr. Scott may talk to him if I don't happen to be there, but he will not make any decisions or take any——

Q. Is just the reverse true if someone comes in from a plant that you do not service?

A. That's right. I won't have anything to do with it.

Q. Do you know of any application for reinstatement, from any source, from Mr. Scheuermann that ever came to the attention of the Local Lodge?

A. I do not. [918]

Q. Now, on or about November 14, 1949, did Lodge 504 have job openings then for machinists?

Mr. Bamford: Just a minute. May I have the question read back?

(Question read.)

The Witness: No.

Q. (By Mr. McGraw): And is that about the time Mr. Scheuermann came to see you?

A. Yes, it was.

Q. Have you ever issued any instructions, to anyone, not to accept an application from Scheuermann? A. No.

Mr. Holmes: I didn't understand that question. An obligation, did you say?

Mr. McGraw: Application.

Mr. Holmes: Application.

The Witness: No.

Q. (By Mr. McGraw): Does any individual in

(Testimony of Franklin W. Gorham.)

Lodge 504 have authority to reject an application for reinstatement without submitting it to the Lodge? A. No.

Q. Did you ever issue any instructions to tear up any application from Scheuermann?

A. No.

Q. Do you know of anyone else who ever issued any instructions—— [919]

A. I do not.

Q. ——to that effect? Do you know Mr. McAuliffe?

Mr. Bamford: Mr. who?

Mr. McGraw: Mr. McAuliffe.

The Witness: Yes.

Q. (By Mr. McGraw): In the normal course of your labor relations work with Westinghouse, did you have occasion to do any business with Mr. McAuliffe's office? A. Occasionally.

Q. Is that an exception rather than the rule?

A. It is.

Q. Do you remember any meeting with Mr. McAuliffe, or any meeting in Mr. McAuliffe's office when he was not present?

A. Yes, I remember the meeting.

Q. Can you tell us when that was?

A. It was in the first part of September. I believe it was September the 6th.

Q. And that is 1949?

A. That's right. [920]

* * *

(Testimony of Franklin W. Gorham.)

Q. And then, if I understand your testimony correctly, you were not on the premises of the Westinghouse Electric Corporation, Sunnyvale Plant, on September the 9th?

A. No, I wasn't anywhere near the City of Sunnyvale on September the 9th.

Q. Now, going back to this meeting which you have fixed on Labor Day, about September the 6th, did you make any remarks such as this: "Now that the contract is buttoned up I want you to discharge Floyd King, John Marovich, Pat Pachorik and Clyde Scheuermann"? A. I did not.

Q. Did you ever make any remarks that might be construed to be similar to that? A. No.

Q. Have you ever made such a remark at any other time or place? A. No.

Q. Did you mention John King's name in any way?

Mr. Holmes: Floyd King.

Mr. McGraw: I beg your pardon.

Q. (By Mr. McGraw): Floyd King?

A. Not that I know of.

Q. Did you mention Marovich's name in any way? A. You mean at this meeting?

Q. Yes, at this meeting. [924] A. No.

Q. Did you mention Pat Pachorik's name?

A. No.

Q. Or Scheuermann's name? A. No.

Q. Were their names mentioned by anyone else?

A. Not that I recall.

Q. Have you, at any time, asked the company

(Testimony of Franklin W. Gorham.)

to terminate King? A. No.

Q. Have you asked the company to terminate Pat Pachorik? A. No.

Q. Have you asked the company to terminate Marovich? A. No.

Q. And other than General Counsel's No. 6, have you ever asked that they terminate Scheuermann?

A. No.

Q. Have you ever attended any meeting at which the layoff of Marovich was discussed?

A. The day after he was laid off I discussed it very thoroughly.

Q. And was that in connection with a grievance?

A. It was.

Q. And where did this discussion take place?

A. As I recall, it was in the Conference Room of Building H-1. [925]

Q. And who was present?

A. I believe Mr. Goodenough, Mr. McAuliffe, Mr. Shields, and I believe Mr. Hilton was there.

Q. Mr. who? A. Hilton.

Q. And who is Mr. Hilton?

A. He is a foreman in the plant.

Q. And will you tell us just who said what, as best you can, and then—— [926]

* * *

Q. How long have you known John [932] Marovich? A. About ten years.

Q. And was that prior to 504 accepting jurisdiction over what is now the Westinghouse Plant?

(Testimony of Franklin W. Gorham.)

A. Yes. [933]

* * *

Q. Now, prior to September the 6th, 1949, that is, the date that this meeting is supposed to have occurred in Mr. McAuliffe's office, did you know that John Marovich had expressed opposition to the administration of the union?

A. Oh, yes, at various times.

Q. In fact, that was customary among active members?

A. That's right, among some of them.

Q. And did you know that he had expressed a preference for the IWW? A. I did not.

Q. Or that he criticized the union?

A. Well, lots of people have criticized the union at various times. I have myself.

Q. Did the Executive Board ever consider this expression of opposition, or this criticism on the part of John Marovich for the union, as being dangerous to the welfare of the union?

A. Not while I was there.

Q. Did they propose any action at that time?

A. No.

Q. Was any action taken? A. No.

Q. Well, if I ask you—well, strike that. Did you ever tell representatives of the Westinghouse Company, at any time, that John Marovich was a trouble-maker? A. No. [934]

Q. Did you ever tell them that he was opposed to the IA of M? A. No.

(Testimony of Franklin W. Gorham.)

Q. That he was in favor of the IWW?

A. No.

Q. That he had criticized the IA of M?

A. No.

Mr. McGraw: May we have a few minutes recess, please?

Trial Examiner Parkes: Yes, we will have a short recess.

(Short recess.)

Trial Examiner Parkes: The hearing will be in order.

Mr. Bamford: Before we proceed, I should like to at this time submit the photostatic copy of GC-11 for incorporation in the record as an exhibit and note that I have returned the original of that document to Respondent Company's Counsel.

Trial Examiner Parkes: The record may so show.

Mr. Holmes: Did you photostat the whole works?

Mr. Bamford: Yes, all pages.

Mr. McGraw: And would you read the last question before we returned? I have forgotten where we left off.

Trial Examiner Parkes: All right, please read it back.

Mr. McGraw: The last question and answer.

(Last question and answer read.)

Q. (By Mr. McGraw): Mr. Gorham, do you know Floyd King? A. Yes, I know him.

(Testimony of Franklin W. Gorham.)

Q. Prior to September the 6th, 1949, did you know that he had [935] expressed opposition to the IA of M?

A. No, I never heard him express opposition to the IA of M.

Q. Did you know that he had expressed a preference for the IWW? A. I did not.

Q. Did you know that he had criticized the IA of M? A. I presume he has.

Mr. Bamford: May I have the last answer, please? I'm sorry.

(Question read.)

Q. (By Mr. McGraw): Now, did you ever tell the company that he had expressed opposition to the IA of M? A. No.

Q. Did you ever tell them that he expressed a preference for the IWW? A. No.

Q. Did you ever tell the company that he criticized the IA of M? A. No.

Q. Was he ever called to account for any opposition or criticism? A. Not that I know of.

Q. Was he ever called to account for any preference for the IWW?

A. Not that I know of. [936]

Q. In fact—Strike that. Did you ever participate in any grievance discussions involving Floyd King?

A. No, not officially at all. We had a discussion about this 1948 Vacation Clause, but that wasn't an official grievance. [937]

* * *

(Testimony of Franklin W. Gorham.)

Q. Have any instructions ever been issued to mark the file of Mr. Scheuermann to indicate that he cannot be readmitted? A. No.

Q. Have any instructions ever been issued by you that he was ineligible to make application for reinstatement? A. No.

Q. Now, as a matter of general policy—Strike that. Will you tell us what the policy of the Lodge is with respect to admitting new members, or reinstating old members, when no jobs are available and the person applying is out of work?

A. I am not permitted to take applications from people who are not employed.

Q. And are there specific provisions in the Constitution? A. There are. [939]

* * *

Q. Have you ever handled any meetings in the cafeteria? A. No.

Q. Have you ever spoken to the employees who might be eating there in the cafeteria during the lunch period?

A. Oh, I might sit alongside one of them and talk to him. [941]

* * *

(Last two questions and answers read.)

Q. (By Mr. Holmes): Did you ever notify the company, any supervisory authority of the company, as to whether or not Clyde Scheuermann or Floyd King or Pat Pachorik or John Marovich had criticized the union? A. No.

(Testimony of Franklin W. Gorham.)

Q. Or that he had expressed opposition to the union? A. No.

Q. Or opposition to the administration in power in the union? A. No.

Q. Or that they, or any of them, had expressed a preference for the IWW Union? A. No.

Q. Did you ever authorize or instruct anybody to act on behalf of Local 504 in conveying such information to the company? A. I did not.

Mr. Holmes: That is all.

Cross-Examination

By Mr. Bamford: [950]

* * *

Q. Prior to the time that you had requested Scheuermann's discharge, if Scheuermann had tendered his dues and initiation fees to you, were you authorized to accept them?

A. Was I authorized to accept them?

Q. Yes. A. Yes.

Q. And to admit him to membership thereon?

A. I don't have anything to do with that. That is done by the Local. It is——

Q. But you'd take them, is that correct?

A. I would have to take it, yes, and submit it to the Local.

Q. When people are fined and expelled from the union, isn't it customary to require a payment of the fine before they are readmitted to membership?

A. Ordinarily, that's right. However, we could request that the fine be suspended or dropped.

(Testimony of Franklin W. Gorham.)

Q. Had you ever, on any occasion, prior to Scheuermann's discharge, instructed your shop stewards not to take dues from Scheuermann? [951]

A. No, there wasn't any necessity for it.

Q. Can you explain that answer?

A. They know that a man who is not a member can't pay dues.

Q. Or initiation fees?

A. I didn't say anything about initiation fees.

Q. I just did. A. I didn't.

Q. I did. Could they accept initiation fees?

A. Yes, they could have. They didn't at that time. The shop stewards didn't ordinarily accept initiation fees or applications.

Q. I see. That was done at the office in San Jose, is that right? A. That's right.

Q. Now, I believe you said that either of the girls or Mr. Scott had told you that Scheuermann had come in and made an application, is that correct?

A. Yes. It isn't quite that simple, however.

Q. Well, perhaps you can explain it.

A. Well, as I recall, Mr. Scheuermann come in and told the girl he worked at Westinghouse and wanted to make out an application. When she found out who it was, why, she found out there was also a letter had been sent to the company requesting his termination so she couldn't accept the [952] application.

* * *

(Testimony of Franklin W. Gorham.)

Q. Isn't it a fact that you asked Mr. McGraw about advice on this matter?

A. I don't recall for sure, Mr. Bamford, whether I did or not.

Q. Isn't it a fact that Mr. McGraw told you that if Scheuermann offered his initiation fees and dues you were not to accept [953] them, that on the other hand you were not to request the termination of Scheuermann? A. That is not correct.

Q. Was there anything said like that?

A. No, Mr. McGraw had no authority to tell me anything of that kind.

Q. Well, isn't Mr. McGraw the representative in this area in handling NLRB matters for the IA of M?

A. That's right, but he has no authority over the Local.

Q. You have consulted him from time to time for advice in connection with NLRB matters, haven't you? A. That's right. [954]

* * *

Q. When new employees come to work for Westinghouse, do you normally advise them of their obligations under the union shop contract you have with Westinghouse?

A. What period are you talking about now?

Q. Well, let's talk about the present time.

A. No, I don't. I don't notify anybody of their obligations.

Q. Do the shop stewards?

(Testimony of Franklin W. Gorham.)

A. They aren't instructed to.

Q. Well, do you know if they do?

A. I couldn't say.

Q. And no one makes any attempt to get them to make applications?

A. I presume that the company tells them that they have to join the union after they have been there a certain length of time.

Q. Isn't it a fact that you receive a weekly list of new employees from the Company?

A. Well, we are supposed to. We don't always receive it weekly.

Q. When you do, and your records show that the new employees have not yet made an application to join your union, you make no attempt to contact them or tell them of their duties under the contract?

A. No, because the chief shop steward also receives a list and [955] he then talks to the other stewards and they find who is members and who aren't.

Q. And then at that time the other chief shop stewards speak to the new employees, is that correct?

A. Either that or one of the other shop stewards.

* * *

Q. Do you know if any shop steward, or any other representative of the union, spoke to Mr. Scheuermann about his obligations under the October 10th, 1949, contract? A. I didn't.

Q. Do you know if anyone else did?

(Testimony of Franklin W. Gorham.)

A. Well, I think some of the stewards did, yes.

Q. Who?

A. If I recall, Mr. Nunez told me that he did.

Q. That he had spoken to Scheuermann about joining the union, is that correct?

A. Well, he discussed the contract with him.

Q. With respect to the union shop provision?

A. I presume so. [956]

* * *

Q. Did you, on any occasion during that period, have private discussions with Mr. Goodenough concerning—— A. I did not.

Q. None at all? A. No.

Q. Never called him up about the wording of any phrase?

A. No, we discussed the wording of the phrases in the negotiations.

Q. Now, to your knowledge, was any attempt made to collect dues from Gennai?

A. Attempts made?

Q. Yes.

A. We didn't attempt to collect dues from anybody. If a man wanted to pay us dues he went over and paid them.

Q. You didn't notify him that he was delinquent?

A. No, he wasn't a member at the time.

Q. Oh, Gennai wasn't a member?

A. That's right.

Q. How long had he been working there?

A. Oh, several months.

(Testimony of Franklin W. Gorham.)

Q. And no attempt was made to sign him up and get him in the union?

A. I didn't make any attempt. [961]

Q. Do you know if any attempts were made?

A. I believe he made an application out prior to April 1st but he never completed it.

Q. What do you mean, made an application out? You mean he had been working there prior—at the time the old contract was in effect?

A. I believe he had worked for Hendy and Westinghouse for about twenty years. He was an old time foundry employee. When the foundry was shut down they offered him a job in the welding department. That was shortly before the contract was terminated by the company. As I say, he made the application out but he never actually—I think he did pay a little on it but didn't pay it up.

Q. I see. Then, he made an application but he never tendered the full amount, is that correct?

A. That is correct.

Q. He hasn't been admitted to membership?

A. That's right.

Q. But his application was still standing?

A. Well, technically, that is true of anybody that ever made one. We never throw any of them away.

Q. But no attempt was made after the contract was signed to pay the rest of it—— A. No.

Q. ——to your knowledge? [962]

A. That's right. [963]

* * *

(Testimony of Franklin W. Gorham.)

Q. But, in fact, didn't they keep one?

A. No.

Q. And they didn't furnish you a copy of the seniority list?

A. No, they did later but not——

Q. But not at the time Marovich was discharged? A. No.

Q. Did you know what his position on the seniority list was?

A. Not exactly. I knew he had been there several years. There wasn't any question that he was an old employee.

Q. Was there a seniority list at the meeting at which you discussd Marovich's and Ashton's discharge? A. No.

Q. There was no seniority list at the meeting, is that correct?

A. Not as I recall it. There wasn't any need for it.

Q. Why? A. Seniority wasn't involved.

Q. The company wasn't following seniority?

A. Well, not in this case. There wasn't any question about that. They admitted there wasn't.

Q. Then, it was just a discharge for cause, is that correct?

A. Well, they put it a little milder, as a release. Actually, if a man is discharged, and it shows, and he goes down for unemployment insurance, he has to wait five weeks before he can collect it. If he is just released, then, they don't have—he [971] goes

(Testimony of Franklin W. Gorham.)

down—I mean, laid off, then he can collect it after the first week. They never discharge any man, or show it as a discharge, except for some extreme reason.

Q. In this case, then, he was just an unsatisfactory employee but had done nothing in the category of a discharge for cause, is that correct?

Mr. Holmes: I think that calls for the conclusion of the witness. This is a matter of the company in its execution of its own policy.

Mr. Bamford: Would you read the question back, please?

(Question read.)

The Witness: Well, I just explained to you, Mr. Bamford, the—I don't know of any case where a man was laid off for unsatisfactory work that was ever discharged. He was released. They don't—it has been their announced policy they didn't try to rub it into him because they weren't satisfied with his work. [972]

* * *

Q. I am referring to September, 1949.

A. I know when you are referring to. As I say, I don't know.

Q. Would it be more than fifty?

A. I presume it would, yes.

Q. Don't you know for a fact that it would have been more than fifty?

A. No, I don't know for sure what it was.

(Testimony of Franklin W. Gorham.)

Q. How many members, at that time, did you have there? A. At Westinghouse?

Q. Yes.

A. Well, I am not sure. It went from over 1200 to around 400.

Q. And how many of those would be journeyman machinists?

A. I don't know because at that time Building 61 still had [978] quite a few people in it and there weren't any journeyman machinists over there.

Q. Well, how many did it have at that time?

A. What?

Q. How many did Building 61 have?

A. Well, it had 300 people in it at one time.

Q. But at the time the plant went down to 400, how many did it have?

A. Well, I think it had over 200 at that time because it was the last one to go down. [979]

* * *

Q. (By Mr. Bamford): Now, with respect to Pachorik, did you ever discuss his retention beyond seniority with the company? A. No.

Q. Did you know he had been retained beyond seniority? A. Yes. [980]

* * *

Mr. Holmes: I don't think I have any questions at this time.

Trial Examiner Parkes: Did you in the meeting with management representatives in Mr. McAuliffe's office, at the time Mr. McAuliffe was not present,

(Testimony of Franklin W. Gorham.)

state in reference to Floyd King that [981] he was one of the worst union members and not fit to be a member of any union, and further not only did you fail to discharge him but you transferred him and gave him a raise?

The Witness: I did not.

Trial Examiner Parkes: Did you characterize Pachorik as being——

The Witness: I don't recall.

Trial Examiner Parkes: Did you characterize Marovich at this particular meeting as being——

The Witness: No.

Trial Examiner Parkes: That is all I have. Is there anything else?

Mr. McGraw: I am through with this witness.

Trial Examiner Parkes: Mr. Bamford?

Mr. Bamford: No. [982]

* * *

Cross-Examination
(Resumed)

By Mr. Holmes:

Q. In your experience as the Assistant Business Agent, or in any other connection with Local 405, Mr. Gorham, in the negotiations of many labor contracts? A. I have.

Q. Have any of them, prior to this 1949 Westinghouse contract, [987] contained union shop or closed shop provisions? A. All of them have.

Q. Have any of them not contained union shop or closed shop provisions? A. No.

Q. That is, during what period of time?

(Testimony of Franklin W. Gorham.)

A. Ten years.

Q. And have all of those contracts been in this area? A. Yes.

Q. Santa Clara Valley, I mean. A. Yes.

Q. And have those contracts been subject to the ramifications or acceptances by the membership of the Local in each case?

A. All of them have, sir.

Q. What means has the Local taken on those occasions—I am speaking of the historical period—what means has the Local taken to advertise or publish the fact that the contracts contained the union shop or closed shop provisions?

A. None.

Q. Has it been customary to publish the contracts or advertise them by posting them on bulletin boards, in any case?

A. No. We, of course, ultimately published the contracts in booklet form for the membership to have copies of them.

Q. That is, as soon after the execution of the contract as was practicable? [988]

A. That's right.

Q. But prior to that, has knowledge of the contracts gone out to the members through just general conversations, or has there been some concerted effort, in any case, to advertise the fact of the union shop or closed shop contract?

A. No, as far as the union or closed shop, that was just taken for granted. [989]

* * *

(Testimony of Franklin W. Gorham.)

Q. They weren't Mr. Goodenough's notes. They were notes prepared by Mr. Goodenough's office assistant.

A. It all amounts to the same thing.

Q. Do you recall Mr. Goodenough saying that?

A. No, I don't recall that.

Q. This was the first union shop contract you had written with Westinghouse, as a matter of fact, wasn't it? A. Oh, by no means.

Q. What? [991]

A. By no means, no. We had a much stronger union shop agreement for a two year period with Westinghouse.

Q. Wasn't that a holdover from the contract with the Santa Clara Valley Employers Association?

A. By no means. Westinghouse at the time was a member of the Employers Association and Mr. McKee, their personnel representative, participated in their negotiations and signed the agreement as one of the members of the agreement.

Q. This is one of the individual contracts?

A. The first individual contract we ever signed with Westinghouse.

Q. I see. Well, did the members of the Negotiating Committee occasionally, or did you occasionally, relate to the members of 504 in the Westinghouse Plant that you were having difficulty in getting the kind of union security provision that you wanted from Westinghouse?

(Testimony of Franklin W. Gorham.)

A. Oh, I presume I did. I reported at the meetings the proceedings and the negotiations, and I probably did. I don't recall any specific instance that I did. [992]

* * *

CARL SCHWARTZ

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McGraw: [993]

* * *

Q. Did Mr. Gorham make any proposals or propositions to the company concerning layoffs that day?

A. Well, as I remember, they were—they wanted to go on a three day, four day week, and he made a proposal that they work them one week and have them off the next week. The purpose of that was so they could get unemployment benefits for the week they were off.

Q. And did the company accept that idea?

A. No.

Q. Did Mr. Gorham make any other proposals that day?

A. No, I don't think nothing outstanding.

Q. Can you tell us, approximately, what time of the day the meeting started?

A. No, I can't.

Q. Can you tell us how long it lasted?

(Testimony of Carl Schwartz.)

A. Oh, I think it lasted about two and a half hours.

Q. And when you left did you leave some of the people there, or did everybody get up and leave at once? [997]

A. Oh, no; some left and some stayed. I didn't pay too much close attention to it. Whenever a meeting breaks up they usually don't go out.

Q. When you went into the meeting did you hear Gorham make any remarks that the agreement was buttoned up? A. No.

Q. Did you hear Gorham ask the company to discharge Floyd King or John Marovich or Pat Pachorik or Clyde Scheuermann? A. No.

Q. Did you discuss any one or all of those individuals in that meeting?

A. Well, we didn't discuss Marovich's name because he had nothing to do with his seniority. His seniority was far removed from the discussion. It was just those people that were in that period who had the less seniority.

Q. Do you know whether or not you discussed any individuals by name in that meeting?

A. Well, no. We took them all as a team.

Q. Now, did you hear Gorham say that Floyd King was the worst union man in the world, that he wasn't fit to belong to a union? A. No.

Q. Did he make any similar statements?

A. No, I never heard them.

Q. About anyone? [998] A. Oh, no.

Q. Can you tell us whether or not at this meet-

(Testimony of Carl Schwartz.)

ing the layoff of Marovich and Ashton was discussed? A. No.

Q. Now, did you hear Mr. Goodenough say, to any of the supervisors, that Gorham had been a good boy in getting the agreement finished and that they ought to try and do him a favor?

A. No. [999]

* * *

Q. And then what did you do about it?

A. I went over to ask Marovich if it was true.

Q. What did Marovich say?

A. He said, yes, it was true.

Q. And then what did you do after that in connection with his termination?

A. I made out a grievance.

Q. And did you try to find Mr. Goodenough that day? A. Yes.

Q. And did you have any particular point in mind in trying to find him?

A. Yes, I wanted to hold up the termination as long as we had [1000] a grievance. Oh, I didn't—I wanted him kept on the job until it was consummated.

Q. And did you find him?

A. No, I didn't.

Q. And did you manage to keep Mr. Marovich on the job until the grievance was disposed of?

A. No.

Q. Now, did you go back and see Mr. Marovich again before he left the plant?

A. Well, after I made out the grievance I showed it to him.

(Testimony of Carl Schwartz.)

Q. And can you tell us what was said at that meeting? What did you say and what did he say, as best you can remember?

A. I don't know. Mr. Marovich didn't go with me in the meeting.

Q. I mean, when you went to see Mr. Marovich towards the end of the day. What did you say and what did he say?

A. Well, we talked about the job and about the accusation they put on him. We talked about that and what he thought about it and what I thought about it.

Q. And did you tell Mr. Marovich that you were going to prosecute this grievance?

A. Oh, yes.

Q. And did he approve of it or disapprove? What did he say?

A. Oh, he approved of it.

Q. And then what did you do with that grievance after [1001] that?

A. I took it to the foreman.

Q. And what is the foreman's name?

A. The foreman's name is Tom Shields.

Q. And when did you take it to Mr. Shields?

A. Well, that same day, immediately, as soon as I could.

Q. And what happened at your discussion with Mr. Shields?

A. Well, he couldn't—he couldn't see it the way I saw it, and he thought the grievance should stand.

(Testimony of Carl Schwartz.)

Q. And did you argue about it? A. Yes.

Q. How long a time did you spend with him?

A. Oh, half an hour, I imagine.

Q. And did you give him any reasons why Marovich shouldn't be laid off? A. Yes.

Q. Can you tell us what those reasons were?

A. Well, I gave the reasons—well, they said that the reason he was fired that he couldn't do the job as quickly as the other shifts, and I pointed out to them that Marovich was doing most of the setups. Sometimes it is hard to find studs and things to make a setup with and tools and stuff, and probably that caused his time of taking longer on the job, and sometimes you have to wait for crane service, and that has occurred several times with different people in the shop. You have to wait and lose time, and I pointed that out to them—management and [1002] the foreman. I didn't think the termination was justified because the swing shift would come on when it was already set up and do a better job, not a better job, but a quicker job, because they don't have the problems.

Mr. McGraw: Now, may we have General Counsel's Exhibit No. 6, please?

(Exhibit handed to Mr. McGraw.)

Q. (By Mr. McGraw): Now, I show you a card and ask you if that's the grievance that you filled out, or a copy of the grievance. A. Yes, that's it.

Q. And the date there is the date you signed the grievance? A. Yes.

(Testimony of Carl Schwartz.)

Q. Now, turning over to the other side of the card, it indicates that your signature is marked there at the bottom of that section for Item No. 1. Did you finally sign the agreement at that spot?

A. Yes, I signed that as unsatisfactory, the answer that he put down there.

Q. Now, did you discuss this grievance with anyone else after this time?

A. Yes, I think either that night or that morning. I got that after I got home. I don't know whether it was in the morning or at night-time. I got that Virus X. I couldn't go to work, so I called Frank Gorham, and I askeed him to process the things. [1003]

Q. And at the same time did you have a grievance for a man by the name of Ashton? A. Yes.

Q. And did you discuss that with Mr. Shields at about the same time? A. Yes.

Q. And were the results about the same?

A. Yes.

Q. And did both of those grievances involve the layoff or termination of people out of seniority?

A. Yes.

Q. Now, after you called Mr. Gorham up about it, did you give the cards to Mr. Gorham?

A. I don't——

Q. I believe you had the grievance cards when you finished talking to Mr. Shields, didn't you?

A. I can't remember how he got them. I thought I called him up on the 'phone and told him to process it.

(Testimony of Carl Schwartz.)

Q. Now, did you have anything further to do with those grievances after you had taken care of the first step or two in the grievance procedure?

A. No, I didn't have anything to do with that.

Q. Were you present when the final argument took place concerning those grievances?

A. No. [1004]

Q. Now, can you tell us how you learned about Mr. Ashton's termination?

A. Well, the foreman over there made—had been complaining about him and finally he made a termination out for him.

Q. Had you heard any complaints from the foreman concerning the work of Mr. Marovich before his termination? A. Yes. [1005]

* * *

Q. Did he ask you to do anything about it?

A. No.

Q. Did you talk to Mr. Marovich about it and tell him that he was too slow?

A. I don't remember.

Q. Now, in the processing of this grievance for Marovich, did you tell the company, or any representative of the company, that Marovich was opposed to the IA of M? A. No.

Q. Did you tell them that he was in favor of the IWW? A. No.

Q. Did you tell them that he criticized the IA of M? A. No.

(Testimony of Carl Schwartz.)

Q. Did you tell the company that Marovich criticized—— A. No. [1006]

Q. Did you ever tell the company anything along those lines about anything of Marovich?

A. No.

Mr. Holmes: By "the company," you mean any supervisor or foreman?

The Witness: That is what I assumed.

Mr. McGraw: That is what I meant to say: any representative of the company, foreman, assistant foreman or superintendent or personnel man.

Q. (By Mr. McGraw): You consider Marovich to be a personal friend of yours? A. Yes.

Q. Did you ever try to get Marovich to be a steward for you? A. Yes.

Q. Can you tell us when?

A. That was just after 504 took over the plant as representatives. I went to him and asked him if he would be a steward.

Q. And did he decline? A. He declined.

Q. Now, Mr. Schwartz, do you know anything about the termination of Clyde Scheuermann?

A. Yes.

Q. How did you first learn anything about Clyde Scheuermann's termination?

A. Well, we were in Goodenough's office and the request was [1007] handed to Mr. Goodenough by Mr. Gorham.

Q. Mr. Gorham handed him a request?

A. Yes.

Q. Do you know when this was?

(Testimony of Carl Schwartz.)

A. I think it was November 11th, if I remember correctly.

Q. And who else was there in Mr. Goodenough's office at that time?

A. I was there, Frank was there, and Goodenough was there. I think just the three.

Q. Did anybody come in while you were there?

A. Well, I can't remember that. People dropped in and out sometimes while we were there in conference.

Q. What was the reason you were there, do you remember?

A. The proocessing of grievances, I think.

Q. Do you know whether or not Mr. McAuliffe came in and atttended that meeting?

A. No, I don't remember.

Q. Do you remember what the subject of the grievance was, or who it was?

A. Right now I can't remember what it was.

Q. Did any discussion take place between Gorham and Mr. Goodenough, at that time, concerning the contents of this letter?

A. Yes, he said something about it. I don't recall what the exact words were. [1008]

Q. Who said it, do you know?

A. Well, Gorham and Goodenough talked about it just briefly.

Q. Now, did you see the letter at that time?

A. Yes, I saw the letter.

Q. When did you see it?

A. When Mr. Gorham gave it to Mr. Goodenough.

(Testimony of Carl Schwartz.)

Q. Well, did you read the letter at that time?

A. No.

Q. Have you ever read the letter? A. Yes.

Q. Do you remember when you read it?

A. Yes, it was when Gennai—Gennai's name was on that letter. He was requested to be terminated too, and, in the meantime, we had found out that he had tried to get—well, tried to get in touch with the steward and pay up. He was delinquent. We asked to have it quashed—taken off—because as long as he had tried to pay the steward we thought that he shouldn't have been terminated. He asked Mr. Goodenough to take his name off.

Q. And did you cross out Mr. Gennai's name and initial it or sign it?

A. Yes, I think I remember—yes, I think I remember doing that. [1009]

* * *

Q. Have you ever participated in any grievances concerning Floyd King? A. No.

Q. Have you ever discussed his layoff status with anyone?

A. No. We discussed it with the group that we mentioned in Mr. McAuliffe's office. Going over layoffs, we discussed it then.

Q. Now, did you ever tell the company that Mr. King was opposed to the IA of M? [1011]

A. No.

Q. Or that he criticized the IA of M?

A. No.

(Testimony of Carl Schwartz.)

Q. Or that he was in favor of the IWW?

A. No.

Q. And by "the company," I meant my question to be any supervisor or representative of the company. Is that the way you understood it?

A. That's right.

Q. Do you know whether or not Mr. King was retained out of seniority? A. Yes, he was.

Q. Do you know whether or not Mr. King was transferred by the company so that they could keep him? A. Well, I don't think——

Mr. Holmes: I think that assumes something——

The Witness: I don't know whether he was transferred. I remember the occasion.

Trial Examiner Parkes: Wait a minute. He is withdrawing the question.

Q. (By Mr. McGraw): Do you know whether or not Mr. King was transferred?

A. Yes, he was.

Q. Can you tell us where?

A. He was transferred to the Maintenance Department. [1012]

Q. And, now, did you discuss that transfer with anybody? A. Yes.

Q. Can you tell us who it was and when it was that you discussed it? A. McAuliffe. [1013]

* * *

Q. Now, what was the union's general position with respect to the application of seniority?

A. Well, we thought seniority was the thing to

(Testimony of Carl Schwartz.)

work on, that the most important thing in the contract was seniority.

Q. And every time the company did something out of seniority, did you try to do something about it? A. Yes.

Q. And it didn't make any difference who it was, did it? A. Oh, no.

Q. Did you ever tell the company that Pachorik was opposed to the IA of M? A. No.

Q. Or that he had criticized the IA of M?

A. No.

Q. Or that he was in favor of the IWW?

A. No.

Q. Do you know of any union representative that ever told the company anything like that?

A. No, I don't.

Q. Now, Mr. Schwartz, when you concluded your negotiations with the company, in 1949, was there a special meeting of the members to consider that agreement?

A. Before it was signed, you mean?

Q. Yes. [1015]

A. Yes, it was read out at the meeting and it was explained to the membership what each part of the agreement meant.

Q. Now, do you know whether or not any notices were sent out announcing that meeting?

A. Well, I don't remember whether the notices were sent out. They usually were, but the stewards were instructed to contact everybody they could and tell them to be sure to be there. That was the——

(Testimony of Carl Schwartz.)

Q. And were there any notices put up in the shop for people to see, advising them of that meeting?

A. I don't remember whether that particular meeting—there usually was. I don't remember if there was, distinctly, for this meeting or not.

Q. Did you see any notices at the tool crib?

A. Yes, it is always customary when there is a meeting to put a notice in front of the toilet and in front of the tool crib, the two tool cribs, one at each end of the building.

Q. And did you receive any instructions from Mr. Gorham to be sure and tell everybody about the meeting? A. Oh, yes.

Q. And you gave similar instructions to all the other stewards? A. Uh-huh.

Q. And did you have occasion to discuss the meeting that was held, by the members of 504, with anybody who wasn't there? A. Oh, yes. [1016]

Q. In fact, the stewards frequently discuss the results of meetings with people at the plant, don't they?

A. Yes, people at the plant. This is a steward's duty, to report what goes on at the meetings. [1017]

* * *

Q. And prior to that time, when a person wanted to make an application, they had to go down to the union office? A. Yes.

Q. And it was true of reinstatements, wasn't it?

A. That's right.

* * *

(Testimony of Carl Schwartz.)

Q. (By Mr. McGraw): Mr. Schwartz, prior to the 1949 agreement with Westinghouse, did the IA of M ever have any provisions for dues deductions by the company? A. No.

Q. Did you provide for such matters in the 1949 contract? A. Yes.

Q. Now, after the agreement was signed, on October the 10th, did the stewards go around through the shops soliciting signatures on dues deduction authorization cards? A. Yes.

Q. And were any instructions issued to the stewards about that?

A. Yes, they were told to—it wasn't mandatory—but to ask them all, if they wanted to have those deductions, they could, and, if they didn't, they didn't need to. [1018]

Q. Do you know whether or not the stewards did that? A. Yes, they did.

Q. Did you personally contact a number of people in soliciting dues deduction cards to be signed? A. Yes. [1019]

* * *

Q. Now, did you ever prefer charges against anybody in the union? A. Yes.

Q. Can you tell us who it was?

A. Well, I preferred charges either against Mr. Ollis or Mr. Scheuermann. I can't remember which one. I know I had preferred charges against one.

Q. About when did you do that?

A. You've got me.

(Testimony of Carl Schwartz.)

Q. Well, was it in 1949?

A. It was in 1949.

Q. Was it the first part, middle part or the last part?

A. It was after—no, it was the last part, towards the last part. It was—no, wait a minute. It was during this period where they tried to start another union.

Q. And did other people prefer charges against him, too? A. Yes.

Q. Now, in your experience as a steward at Westinghouse, have you ever known any member of the IA of M who was disciplined by the union because he disagreed with the opinions of the business agent or the officers of the union?

A. No. [1020]

Q. Do you know of any members who were disciplined because they disagreed with the policies of the union? A. No.

Q. Do you know of any person at Westinghouse, at any time, who has lost their job because they opposed the IA of M? A. No.

* * *

Cross-Examination

By Mr. Holmes: [1021]

* * *

Q. Did they do that during the course of the working hours? A. Yes, they did.

Q. Did they turn cards signed over to you?

A. Yes, they did.

(Testimony of Carl Schwartz.)

Q. And you made some arrangements with Mr. Goodenough's office, or with the foreman, to carry on that activity? A. Yes.

Mr. Bamford: Excuse me. I didn't hear the question. May I have it, please?

(Question read.)

Q. (By Mr. Holmes): Was it in Mr. Goodenough's office or the foreman's office?

A. In Goodenough's office.

Q. Do you know how long that went on?

A. It was going on all the time.

Q. Well, did it start right after the contract was signed? A. Yes.

Q. And it is continuing at the present time?

A. Yes.

Mr. Holmes: I think that is all.

Q. (By Mr. Bamford): On the check-off sheets, Mr. Schwartz, the check-off slips rather, would the other stewards turn them over to you?

A. Yes.

Q. I see. And then you turned them over to Mr. Goodenough, is [1024] that correct?

A. No, I would turn them into the union office, gave them to Mr. Gorham.

Q. Now, when did you start this program of soliciting check-offs?

A. That was just immediately after the contract was signed.

(Testimony of Carl Schwartz.)

Q. Did you have a supply of check-offs?

A. Yes. [1025]

* * *

Q. There were none?

A. I don't remember.

Q. I see. Normally, are you informed as to when a member becomes delinquent by Mr. Gorham?

A. Sometimes the girl tells me.

Q. At the office? A. Yes.

Q. And at that time you then make an attempt to contact the employee, is that correct?

A. Yes, and see what is the trouble. If he is in a certain steward's department, I tell the steward to go out to this man, and he takes care of that. That probably happened in Cleveland Norris' case. Sometimes I don't know the particulars of the issues. I turn it over to the steward who is in charge of that department. [1030]

* * *

LOUIS NUNEZ

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McGraw:

Q. Will you state your complete name, please, for the record? A. Louis C. Nunez.

(Testimony of Louis Nunez.)

Q. Where do you work? A. Westinghouse.

Q. And how long have you been working there?

A. About two and a half years.

Q. And do you have any position with the IA of M? A. I am the steward on the swing-shift.

Q. And do you know Clyde Scheuermann?

A. I do.

Q. Does he work on the same shift that you do, or did he? A. He did.

Q. Have you ever talked to Mr. [1057] Scheuermann? A. I did.

Q. Was that frequently or infrequently?

A. Oh, frequently.

Q. Now, after the union shop election was held in 1949, did you have occasions to have any conversations with Mr. Scheuermann?

A. I did after he come back—back from—come back to work.

Q. And can you tell us approximately how many conversations you had with him?

A. A couple of times, I imagine.

Q. And can you tell us, approximately, when those conversations occurred?

A. I couldn't be hardly definite on the time but it was after our contract was signed that he come back to work.

Q. And what did you discuss with him?

A. The terms of our contract.

Q. And was this after the union meeting in which

(Testimony of Louis Nunez.)

the contract had been ratified? A. Right.

Q. And did you discuss the union security provision of the contract? A. Yes.

Q. And did you discuss the seniority provisions of the contract? [1058]

A. More or less the seniority provision. We discussed that quite often.

Q. And did you discuss the wage administration clause with him?

A. Yes, the discussion come around on the classification of machinists.

* * *

Q. Did Scheuermann ever ask you anything concerning his reinstatement in Lodge 504?

A. Well, it was something to that effect, but I don't remember the exact words at the time.

Q. Can you tell us what the substance of the conversation was?

A. Well, it was similar to being fined, or something to that effect at that time.

Q. And what did you tell him?

A. I told him at the time that I didn't know. He had to see our assistant business agent.

Q. Is that Mr. Gorham? A. That's right.

Q. Did you distribute any dues deduction authorization cards [1059] among the people on the night-shift? A. I did. I still do.

Q. And did you contact Mr. Scheuermann with regards to dues deductions before he was laid off or terminated?

(Testimony of Louis Nunez.)

A. We discussed it, but I don't think I contacted him in that respect as to the deduction of dues.

Q. Now, in your experience there at Westinghouse, have you ever known any member of the union who was fined by the union for criticizing the union?

A. No, we have a free vocal as long as we go—in other words, we have—in other words, we cuss there just like anybody else.

Q. And as a steward did you ever discuss with any representatives of management, or tell any representative of management, that Scheuermann was hostile to the IA of M? A. I did not.

Q. Did you ever discuss any of his union activities with management at any time?

A. I did not.

Q. Do you know Pat Pachorik?

A. I know him by sight.

Q. You never worked with him?

A. No. I work in a different department.

Q. And a different shift, too, I believe?

A. Yes. [1060]

Q. When did you first know that Mr. Scheuermann was being terminated?

A. I think it was the evening of the time he was terminated, of the day he was terminated. I don't know much about it.

Q. Did he come up to you and say anything about it?

A. No, I didn't see Mr. Scheuermann that evening.

(Testimony of Louis Nunez.)

Q. Have you ever discussed it with him since then?

A. No, I don't think I have seen Mr. Scheuermann. I run into him once, but he just said, "Hello," and that is all.

Q. Now, did you see any notices posted around the shop advising the members of 504 that there was going to be a meeting to discuss the contract?

A. Yes, I posted them myself.

Q. And did you talk to various people on the night-shift, telling them about the meeting?

A. About 90 per cent of them.

Mr. McGraw: That is all.

Cross-Examination

By Mr. Holmes: [1061]

* * *

Q. Well, just tell us in substance what was said.

A. The substance was that he come back to work and how he was doing and so forth; discussed the contract we had. He says, "What kind of a contract do we have?" I gave him the highlights of the contract, because it takes hours to discuss the whole thing.

Q. This was right after he came back to work?

A. Right after he come back to work.

Q. And you also discussed the contract with him, again, on another occasion, is that correct?

A. I think a week or so later. I don't remember just exactly the length of time between those two

(Testimony of Louis Nunez.)

encounters we had. We never was too—we stopped and discussed—the general discussions—who was on the shop at the time—like the check-off system. He said he didn't like it, and I didn't like it either at the time.

Q. And that the election—— A. Yes.

Q. And that the election—Withdraw that.

A. Yes?

Q. It was right after that that you had these discussions, is that right?

A. That's right, after the election. [1063]

Q. And right after he came back to work?

A. That's right. [1064]

* * *

The Witness: As I said before, I don't know whether he was expelled, but it was six months before he—was that I knew he was fined.

Q. (By Mr. Bamford): He tried to pay his dues six months——

A. Before anything of that kind, before even anything that I knew about it. He just offered me to pay $2.50 for dues and I took them. He come to my machine and offered them. [1075]

Trial Examiner Parkes: What was the year this happened?

The Witness: '49.

Trial Examiner Parkes: What part of '49?

The Witness: It was in the winter of '49. I couldn't remember just exactly. Probably in January, February, sometime at that time. [1076]

* * *

FRANKLIN W. GORHAM

a witness called by and on behalf of the Respondent Union, having been duly sworn, was recalled and testified further as follows: [1080]

Redirect Examination

By Mr. McGraw:

* * *

Mr. McGraw: May we have this marked for the purpose of identification, if you please?

(Thereupon, the document above referred to was marked Respondent Union's Exhibit No. 7 for identification.)

Q. (By Mr. McGraw): Now, Mr. Gorham, I direct your attention to this side marked No. 2. Will you tell us what each of those columns stand for, what the information indicates or is?

A. Starting from the lefthand side, the dates on which the dues were received, a receipt number, number of months paid, the last month paid, the amount paid and the month that it was reported to the International. There's some pencil marks in the column under "Assessments" and those are the names, pencilled in, of the person who collected the dues. [1081]

Q. All right. Now, can you tell from that card when Mr. Nunez collected some dues from Scheuermann?

A. Yes, on the 31st day of March he collected for the month of January, one month, the sum of $2.00.

Q. What year was that? A. 1949.

(Testimony of Franklin W. Gorham.)

Q. Now, does this card indicate the present status of Mr. Scheuermann with respect to the IA of M? A. Yes.

Q. And where is that and what does it say?

A. On the right hand side of the card, in a rather large box it contains the words, "Expelled 4-49."

Q. Is there anything on the card that indicates the amount of his fine? A. No.

Q. Should there be? A. Yes.

Q. Who normally makes a notation on the card?

A. The office girls.

Q. Now, next to the column which you have testified was the last month paid, I note—I notice some little markings of some kind. Can you describe those markings and tell us what it means?

A. Above the month, or next to it, those indicate that in each one of those months he was—he was in the third—he [1082] would have been delinquent by the first day of the following month and a notice was sent to him by mail.

Mr. Bamford: I should like to move that that answer be stricken as irrelevant.

Trial Examiner Parkes: I am trying to recall his testimony. I believe it is sufficiently relevant to Mr. Nunez's testimony to justify its admission into evidence. The motion to strike is denied.

Mr. Holmes: It is previously in the record that Mr. Scheuermann waited until the last day before he paid one month's dues.

Trial Examiner Parkes: I believe that was his testimony. However, we are now confronted with

(Testimony of Franklin W. Gorham.)

surrebuttal, whatever you might call it. We have taken Mr. Gorham out of order. The record might also show that we had no other witnesses available at the present time.

Q. (By Mr. McGraw): Now, does this card indicate his address at the time that his membership was terminated? A. Yes.

Q. And does it also indicate the prior lodges that he belonged to? A. Yes.

Q. Now, will you tell us briefly what is on the other side of the card?

A. It is identical with the side marked "No. 2." It is merely [1083] for an earlier period.

Q. And does that reflect the complete record dues—dues record of Mr. Scheuermann with Lodge 504? A. Yes. [1084]

* * *

LESLIE OLLIS

a witness called by and on behalf of the Respondent Union, being previously sworn, was examined and testified as follows:

Redirect Examination

By Mr. McGraw: [1088]

* * *

Q. What was your answer?

A. I said I hadn't worked on the garage. I loaned her a cement mixer.

Q. And do you know who did the work on the garage?

(Testimony of Leslie Ollis.)

A. I know Clyde worked at least part of the time on it.

Q. Is that Clyde Scheuermann?

A. That is Clyde Scheuermann, yes.

Q. Now, I believe you testified a few days ago that previous to belonging to Local 504 you had joined one of the machinists' lodges in the San Francisco Bay Area, is that correct?

A. Aeronautical and Production Workers with Anthony Ballerna, I believe the name was.

Q. B-a-l-l-e-r-n-a. Now, I show you this card and ask you if you can tell us what it is.

Mr. Bamford: May I see it, Counsel, please, before the witness does?

Mr. McGraw: You may.

The Witness: I don't recall signing it but this is—I don't doubt that it is quite obviously an application, or a form that I filled out. [1089]

Q. (By Mr. McGraw): Is that your signature at the bottom?

A. It certainly looks like it.

Q. And did you ever use green ink in your pen?

A. Well, I may have. I certainly haven't used it for years.

Q. And is that date of September 19th, 1941, approximately correct?

A. Well, it could be correct. It was previous to the war. [1090]

* * *

MALCOM R. NELSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bamford:

* * *

Q. In 1949, were you employed at Westinghouse, Sunnyvale Plant? A. Yes.

Q. For the entire year? A. Yes.

Q. What shift did you work that year?

A. Day shift.

Q. What was your job?

A. For the full year of '49?

Q. Yes.

A. I was working as a journeyman on assembly until August the 1st, when I was transferred to maintenance.

Q. And you remained on maintenance for the balance of the year? A. Yes, sir.

Q. Where was your locker situated? [1109]

* * *

The Witness: My locker is off in the assembly—Building 41.

Q. (By Mr. Bamford): Did Clyde Scheuermann and Les Ollis have their lockers near yours?

A. They were right close by mine.

Q. Was Elmer Smiley's locker near there?

A. Yes, very close. [1110]

* * *

(Testimony of Malcom R. Nelson.)

Q. On any occasion, following June 1st, 1949, did you ever see Les Ollis try to pay dues to Elmer Smiley?

A. How do you mean by "see"? I don't rememebr seeing any money transacted. He offered to pay dues.

Q. Did this occur on one occasion or on more than one occasion?

A. I would say more than one.

Q. How many to your memory?

A. I don't know.

Q. Do you remember if Clyde Scheuermann was present on any of these occasions?

A. Yes, I'd say Clyde was present.

Q. Does any particular occasion fix itself in your memory?

A. Well, there was one time in the locker room when Smiley and Ollis went at it a little heavier than usual, and we couldn't help but all of us remember that.

Q. Well, can you remember how the incident arose?

A. No, there was so much kidding about it anyway. I don't know how it got started. [1115]

Q. How do you mean "kidding about it"?

A. There was joking around about a new union and being fined and not paying dues, and the rest of us paid and they could get by for nothing.

Q. Did you participate in any of that kidding yourself?

(Testimony of Malcom R. Nelson.)

A. Well, I usually don't keep my mouth shut when I ought to.

Q. Well, do you remember what Ollis said and what Smiley said on this occasion?

A. No, only that this is one of the times that Ollis offered to pay dues.

Q. Well——

A. But I don't remember seeing him dish out the money.

Q. Do you remember what Smiley said when Les made that offer?

A. Not the exact words, but Smiley's stand was the same every time: that under the I. A. of M.'s business laws there was a fine imposed and he couldn't pay them. He couldn't accept the dues.

Q. Do you remember if Scheuermann was there on that occasion?

A. At the time that Ollis and Smiley——

Q. Yes. A. ——got angry?

Q. Yes. A. Yes, Clyde was present.

Q. Do you remember if anyone else was present?

A. Well, it was wash-up time. The locker room was fairly full. I couldn't say just how many or who was in there. [1116]

Mr. Bamford: No further questions.

Cross-Examination

By Mr. Holmes:

Q. Mr. Nelson, with whom have you talked about this testimony? A. How do you mean?

Q. Well, have you discussed this matter with

(Testimony of Malcom R. Nelson.)

anybody, these things you have just testified to?

A. Well, certainly, we have been talking about these things in the plant ever since they started the first time the witnesses have gone out.

Q. Have you talked about Mr. Scheuermann recently?

A. I haven't seen Scheuermann until——

Q. Have you seen Ollis lately?

A. I haven't talked to him about it.

Q. Do you remember talking to me about it?

A. Yes, sir.

Q. Do you remember telling me that you didn't know whether Mr. Ollis had ever offered his dues or not?

A. Didn't I tell you that I had never seen the money dished out, but that he had eventually offered to pay him?

Q. Didn't you tell me that you didn't see any offer to pay dues in the locker room?

A. No, as I remember I told you that it was more than once that he offered to pay. You said that he had only testified to the fact that he offered to pay once, and I said I recalled it being more than once. [1117]

Q. Didn't I tell you that Mr. Ollis had testified to an incident in a locker room? Didn't you tell me that you didn't recall such an incident?

A. I don't remember saying that. It seems to me I told you that I could remember once when he offered to pay out at Smiley's chest, and that there was an incident in the locker room.

(Testimony of Malcom R. Nelson.)

Q. You told me about an incident near Smiley's tool box or something. Didn't you tell me that was the only one you could remember? A. No, sir.

Q. You testify now that Mr. Ollis offered to pay dues, is that right? A. Yes, sir.

Q. Did somebody tell you about that?

A. No, sir. That was common talk. I told you that in the office.

Q. Was that common talk around the plant?

A. Certainly.

Q. Was that how you heard of it?

A. No, I heard it. I was in the locker room.

Q. I am not talking about the locker room; I am talking about the incident on the floor. You said there was more than one incident when Mr. Ollis offered to pay dues; is that right?

A. Yes, sir. [1118]

Q. Now, where did they take place?

A. Well, what did I tell you in the office?

Q. Well, I am asking the questions here. I am in a privileged position.

A. I said once was in the locker room.

Q. Well, I am asking you about incidents other than in the locker room.

A. And I said once was out at the tool box.

Q. All right. Are there any other occasions?

A. I don't remember any more. [1119]

* * *

Q. Now, just exactly what was said, so far as you can remember, on this occasion in the locker room?

(Testimony of Malcom R. Nelson.)

A. I can't remember exactly what was said in a locker room a year ago.

Q. Tell me, as best you can remember. I realize that it is a year ago and you haven't thought about it.

A. I hadn't thought about it until I was slapped in the face with it.

Q. How were you slapped in the face?

A. I don't know.

Q. I ask you what you knew about it, is that right? A. Yes, sir.

Q. You told me that your memory was pretty vague about it, didn't you? A. Yes, sir.

Q. You told me that you couldn't remember very much about it, isn't that right?

A. I said I couldn't remember much about what was said in actual words or——

Q. All right, now. You have had a few days to think about it. Do you remember anything that was said in that locker room on [1124] this occasion?

A. A man's mind can freshen up a little, but I don't remember what the conversation was, no.

Q. Do you remember anything at all as to what was said? A. Not the exact words.

Q. In substance?

A. In substance, he offered to pay his dues.

Q. How did he say that?

A. No, I don't——

Q. Did he say, "Why don't you take my dues?"

A. I don't remember what words he used.

(Testimony of Malcom R. Nelson.)

Q. Did he say, "I will give you my dues right now?"

A. I don't remember what words he used.

Q. Do you remember anything Mr. Smiley said?

A. Not exact words.

Q. Well, in substance?

A. In substance it was the same. I imagine he told you the same thing. He couldn't accept it under the Bylaws of the IA of M.

Q. He referred to the Bylaws of the IA of M?

A. I don't know if he went into detail at that time or not. Different things were brought into detail at the time. [1125]

* * *

Q. Well, I think you did. I want you to clarify it. If you didn't, you are free to change your answer. Do you know whether this locker room incident occurred before or after August the 25th?

A. No, I don't know whether it happened before or after.

Q. Do you know when the new contract was ratified by the union? A. Not exactly.

Q. Did you attend the meeting at which the contract was ratified or accepted?

A. The union meeting?

Q. Yes, on a Sunday morning?

A. Yes, sir.

Q. A Sunday morning at the Labor Temple?

A. Yes, sir. [1127]

Q. Do you know whether this locker room incident occurred before or after that?

(Testimony of Malcom R. Nelson.)

A. I don't remember that.

Q. You don't know? A. No.

Q. You don't know one way or the other?

A. No.

Q. Would it refresh your recollection if I told you that this union meeting, at which the contract was accepted, took place on October 8th or 9th?

A. No, I don't remember when it took place.

Q. Now, with respect to the date October 8th or October 9th, do you know when this locker room incident took place? Was it before or after?

A. I don't know whether it took place before or after.

Q. Was anything said at that time about union initiation fees? A. How do you mean that?

Q. Well, was the term "initiation fees" mentioned at all, or was the conversation limited to dues?

A. The incident in the locker room between Ollis and Smiley?

Q. The incident that you have testified about.

A. They were talking about dues.

Q. Is that the only term that was used?

A. That is the only one I remember. There may have been [1128] more.

Q. Was there any money offered?

A. I don't remember any money being offered.

Q. Where was Scheuermann with respect to Smiley and Ollis? How far away was he?

A. Well, the aisle is about three foot wide between the lockers there, and his locker was right

(Testimony of Malcom R. Nelson.)

behind mine. I don't suppose he was over two or three feet.

Q. That is, across the aisle from yours?

A. Yes, sir.

Q. Where is Smiley's locker from yours?

A. Well, it is—if my directions are right—west. It is down the aisle about, oh, maybe eight or ten lockers, approximately that is.

Q. Lockers about a foot wide or more?

A. About a foot.

Q. And Smiley's locker is about eight or ten feet from yours? A. Approximately, yes.

Q. And Scheuermann's is right across the aisle?

A. Yes, right across the aisle.

Q. Across the aisle from you. Where was Ollis' locker. Where was it?

A. As I say, it was right next to Clyde's.

Q. Right next to Scheuermann's, is that it?

A. That's right, the way I remember it. [1129]

Q. Is it on the side toward Smiley or away from Smiley?

A. I don't know what side it was on and——

Q. And were Smiley and Ollis shouting at each other?

A. I don't remember if they were shouting. I did say their voices was louder than usual.

Q. They were talking in a loud voice, then?

A. They were a little hot under the collar and they spoke a little louder than usual.

Q. Yes. Were other people in the locker room talking?

(Testimony of Malcom R. Nelson.)

A. Sure, everybody is talking in the locker room.

Q. Now, do you remember anything that Ollis said, specifically?

A. Well, only that he offered to pay his dues.

Q. That is your conclusion. I want to know what was said.

A. I don't remember the exact words.

Q. Did he just make one statement: "I offer you my dues," and then Smiley says, "I wont take them," is that all that happened?

A. I think there was a little more discussion than that. [1130]

* * *

Mr. Holmes: I wish at this time to renew my motion to dismiss the complaint in its entirety, and, in the alternative, to dismiss the complaint insofar as it alleges an unfair labor practice with respect to John Marovich, and again in the alternative insofar as it relates to any unfair labor practice involving Mr. Clyde W. Scheuermann. I would like to say just a few words in addition to what I have already said, and I direct it particularly to the Marovich case.

I think that it is very clear upon the record, now that it is completed, even clearer I should say than it was at the time I first addressed this motion to the Trial Examiner, that the allegations of the complaint are not sustained by any substantial evidence; that the evidence clearly shows that there is no evidence of unfair labor practices insofar as John

Marovich is concerned; that his discharge was for a good or sufficient [1137] cause, or rather, that his release was for a good and sufficient cause, completely in accordance with the custom and practice of the company; that it was not in collusion with the union or demanded or requested by the union in any respect; that since it had no connection with anything—any relationship that Marovich may have had with the union, that it was clearly a release in the normal course of business and without any intention or motive to interfere in any way with the rights of employees.

The employer is entitled to lay off or terminate or release an employee when he is unsatisfied due to his quantity of production, and this was clearly a release for that reason. Whether or not the employer used good or bad judgment in determining that is beside the point. The point here is that the employer acted in complete faith in that regard and was not motivated in any respect in any regard to Marovich by any consideration of his union activities or lack of them.

With respect to Mr. Scheuermann, I think that, in addition to what I have previously said, the evidence is now clear that Mr. Scheuermann had knowledge of the contract in 1949; that he knew of his obligations under that contract, and that he did not undertake in any way to discharge those obligations; that he was working there in the hope that he would be ignored by the union and in the expectation that the union would be afraid to do anything, even though he failed to discharge his obligations [1138] under the contract; he was further

working there under the mistaken apprehension that he was fully protected by the law. Now, he was mistaken in that, of course. He is bound by his error in that regard even though he may have been mistaken as to his understanding or interpretation of the law. The law is clear, and he is assumed to know its provisions. So, whether he felt that the law would protect him is beside the point. He had obligations under the contract. It is a perfectly legal contract.

No question as to its validity has been raised here and his discharge after the 32nd day after its execution is a completely legal discharge within the terms of the Act.

I don't think I need to belabor the point here. I think it is sufficiently clear that there is no obligation on an employer to go to 1,000 or 1,500 employees and specifically tell each one that he has only thirty days or twenty-nine days or one day to join the union. There was sufficient knowledge around that plant and sufficient subjected knowledge on the part of Mr. Scheuermann that he, as a reasonable man, was under the obligation to at least see what he could work out with the union. Then, if the actions of the union were unsatisfactory, to pursue it with management. He, knowing of his obligations and expecting to ride along because he was somehow untouchable, did nothing.

I think that is enough for the motion to dismiss. If it is [1139] denied, I shall pursue it in the brief.

Trial Examiner Parkes: I shall reserve ruling upon your motion to dismiss.

Mr. McGraw: I want to make a motion to dismiss, Mr. Trial Examiner, the complaint in its entirety insofar as the union is concerned or in the matter of several alternatives insofar as the complaint pertains to each of the individuals named; namely, John Marovich, Clyde Scheuermann, Floyd King and Pat Pachorik, taken either as individuals or a combination of those individuals. [1140]

* * *

EARL B. SCOTT

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McGraw:

* * *

Q. And what is your official capacity with the IA of M? A. Business Representative.

Q. And for any particular unit?

A. For District Lodge 93 of the IA of M.

Q. And does that also include Lodge 504?

A. It does. [1158]

* * *

Q. Do you know Clyde Scheuermann?

A. I do.

Q. Can you tell us how long you have known him?

A. I would say approximately two or three years.

Q. Have you ever had any discussions with him?

A. Only one.

(Testimony of Earl B. Scott.)

Q. Can you tell us when that was?

A. I believe sometime in the early part of this year or in the latter part of last year.

Q. Do you know where it was? A. I do.

Q. Who was present?

A. The only person that possibly could have been present, besides Scheuermann and myself, could have been a girl working in our office who takes care of the counter.

Q. Do you know whether or not she was present?

A. I couldn't answer that definitely. I don't recall.

Q. Now, will you tell us how you happened to have this conversation with Mr. Scheuermann?

A. I was called to the counter and told that Scheuermann wanted to see me.

Q. And can you tell us who started the conversation and who said what?

A. Mr. Scheuermann started the conversation. He said that he [1159] would like to get back into Lodge 504.

Q. And what did you tell him?

A. I told him he would have to see Mr. Gorham. Mr. Gorham had been assigned to take care of Lodge 504 and I never injected myself into those matters on reinstatements or initiations, things like that. I never handle that.

Mr. Bamford: Just a minute. May I have the question and answer read back, please?

(Question and answer read.)

(Testimony of Earl B. Scott.)

The Witness: Proceeding further, I told Mr. Scheuermann that I would be very happy to make an appointment for him to meet with Mr. Gorham. Mr. Gorham was not in at that time and I did make an appointment and Scheuermann did come in and see Mr. Gorham. That is the full extent of my conversation with Mr. Scheuermann.

Q. (By Mr. McGraw): And when did Mr. Scheuermann come to see Mr. Gorham?

A. If my memory serves me correctly, it was the next day.

Q. And did he mention anything about being terminated at Westinghouse, Sunnyvale Plant?

A. No.

Mr. Bamford: Just a second. You mean at the conversation he had with the witness?

Q. (By Mr. McGraw): I am referring now to your discussion with Mr. Scheuermann. [1160]

A. That is true.

Q. Did he mention anything about having been terminated? A. No, he did not.

Q. Did he mention anything about having been expelled by the IA of M? A. No, he did not.

Q. Did you tell Mr. Scheuermann that he could rejoin the IA of M and get straightened out if he paid his dues and reinstatement fees and a $500 fine? A. Absolutely not.

Q. Did you look at Mr. Scheuermann's membership record before you spoke with him?

A. I did not.

(Testimony of Earl B. Scott.)

Q. Did you refer to it at any time during the conversation? A. I did not.

Q. When the girl came to you to tell you that Mr. Scheuermann wanted to see you, did she bring his membership record? A. She did not.

Q. Did she tell you that she had destroyed or torn up an application made by Scheuermann?

A. She did not.

Q. Did she tell you that Mr. Scheuermann had filled out any card or paper? A. She did not.

Q. Did you ever instruct her to tear up any paper signed by [1161] Scheuermann?

A. Absolutely not.

Q. Did—Strike that. In the normal course of business, what kind of papers are filled out at the counter?

A. Applications for initiations, applications for reinstatements, applications for employment of both members and non-members, applications for withdrawal cards, excuses for attendance at meetings. There must be some others, but they don't come to my mind at the moment.

Q. Now, do you also fill out any forms in connection with unemployment? A. We do.

Q. Did anyone report to you, or inform you in any manner, that Mr. Scheuermann had filled any form out prior to his conversation with you?

A. Absolutely not.

Q. Did Scheuermann ask how much he owed the union? A. He did not.

* * *

(Testimony of Earl B. Scott.)

Cross-Examination

By Mr. Bamford: [1162]

* * *

Q. Did Mr. Gorham tell you that he was planning to request Scheuermann's termination?

A. He did not.

Q. How did you first hear of it then?

A. I saw the notices—or not the notices—but the list of drops and the suspensions. They were laid on my desk by all the business agents, the same as the initiations—the same as the initiations and reinstatements in all of the locals.

Q. What do you mean by a "drop"?

A. A drop is where a man fails to keep his dues up. He is dropped from membership.

Q. Well, what does it look like? Is it a piece of paper? A. What, a drop?

Q. Yes. You said you had seen all the drops. What does a drop look like?

A. Well, I don't know whether you are trying to be cute on this thing or not, but a drop is a man who has been dropped from membership because he hasn't kept his dues paid up. [1163]

Q. Well, is that put on some form?

A. Yes, there is a regular list of those members who have been dropped. Maybe you would understand it a little better if I said suspended from membership. We call them drops.

Q. And Scheuermann's name appeared on a list?

A. I don't know whether it was on a list. I don't

(Testimony of Earl B. Scott.)

know what list it was on or what month it was or anything like that, but anybody who has been a member and is no longer a member, his name is put on a list and it is laid on my desk each month when the books are closed. That applies to all locals because I like to know who has let themselves go delinquent. The same thing would apply, in any of the cases, where communications are sent to companies requesting that people be laid off. The copies of those communications are laid on my desk. [1164]

* * *

Q. But at no time did Gorham ever ask you about the validity of Scheuermann's discharge, is that correct?

A. Not to my knowledge. I would be very much disappointed if people who worked under me would have to come to me and ask me the legality of things. They are assigned to take care of the thing and that is their job.

Q. Did you talk with either the reception girl or with Gorham, any time, about the paper Scheuermann had filled out when he came in to see you?

A. No.

Q. Neither of them mentioned that Scheuermann had filled out a paper?

A. Neither mentioned that Scheuermann had filled out a paper.

Q. Do you know that he had filled out a paper?

A. No, I still don't know it.

Q. Do you know why Scheuermann had been fined and expelled?

A. Yes, at the time I did. [1168]

* * *

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board, Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled "In the Matter of Westinghouse Electric Corporation (Sunnyvale Plant) and Clyde W. Scheuermann, an Individual, Case No. 20-CA-328," and "In the Matter of International Association of Machinists, Local No. 504, and Clyde W. Scheuermann, an Individual, Case No. 20-CB-102." Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Frederic B. Parkes Trial Examiner for the National Labor Relations Board, dated August 29, 1950.

(2) Stenographic transcript of testimony taken before Trial Examiner Parkes on August 29, September 5, 7, 8, 12, 13, 14, 15, 18 and 20, 1950, together with all exhibits introduced in evidence.[1]

(3) Deposition of Earl B. Scott, taken on September 25, 1950, by Louis Penfield, officer designated by the Trial Examiner. (Attached to Item 2 above.) (Received in evidence in Trial Examiner's Intermediate Report, dated March 15, 1951, page 3.)

(4) Joint telegraphic request of all parties for extension of time for filing briefs with Trial Examiner, dated October 2, 1950.

(5) Copy of Chief Trial Examiner's telegram, dated October 3, 1950, granting all parties extension of time for filing briefs.

(6) Certificate of Officer taking deposition, dated October 17, 1950.

(7) Joint telegraphic request of Westinghouse Electric Corporation and Respondent Union, dated

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[1]Volume II of the certified record commences with numeral page 5. On September 1, 1950, the General Counsel moved orally for continuance of the hearing to September 5, 1950, and the Trial Examiner granted the motion. Pages 1 to 4 were set aside for transcription of said motion and order; however, the transcription was never effected. (See footnote 5 of Trial Examiner's Intermediate Report, dated March 15, 1951, for recordation of the proceedings of September 1, 1950.)

October 25, 1950, requesting further extension of time for filing briefs with the Trial Examiner.

(8) Copy of Chief Trial Examiner's telegram, dated October 25, 1950, granting all parties further extension of time for filing briefs.

(9) Joint telegraphic request of Westinghouse Electric Corporation and Respondent Union, dated November 8, 1950, requesting still further extension of time for filing briefs with the Trial Examiner.

(10) Copy of Chief Trial Examiner's telegram, dated November 10, 1950, granting all parties still further extension of time for filing briefs.

(11) Trial Examiner's order correcting transcript, dated February 27, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(12) Copy of Trial Examiner's Intermediate Report, dated March 15, 1951 (annexed to Item 17 hereof); order transferring cases to the Board, dated March 15, 1951, together with affidavit of service and United States Post Office return receipts thereof.

(13) General Counsel's telegram, dated April 4, 1951, requesting extension of time for filing exceptions and brief.

(14) Copy of Board's telegram, dated April 5, 1951, granting all parties extension of time for filing exceptions and briefs.

(15) Exceptions to the Intermediate Report, received from Westinghouse Electric Corporation on April 16, 1951.

(16) General Counsel's exceptions to the Intermediate Report, received April 17, 1951.

(17) Copy of Decision and Order issued by the National Labor Relations Board on September 28, 1951, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 22nd day of May, 1952.

[Seal] /s/ LOUIS R. BECKER,
Executive Secretary.

NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 13400. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Association of Machinists, Local No. 504, Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed May 26, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13400

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Association of Machinists, Local No. 504, San Jose, California; its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "In the Matter of Westinghouse Electric Corporation (Sunnyvale Plant) and Clyde W. Scheuermann, an Individual, Case No. 20-CA-328," and "In the Matter of International Association of Machinists, Local No. 504, and Clyde W. Scheuermann, an Individual, Case No. 20-CB-102."

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on September 28, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers, representatives, agents, successors, and assigns. So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Upon the entire record in these cases, and pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that International Association of Machinists, Local No. 504, San Jose, California, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Westinghouse Electric Corporation (Sunnyvale

Plant), its officers, agents, successors, and assigns, to discharge or in any other manner to discriminate against its employees with respect to whom membership in the Respondent Union has been denied or terminated upon some ground other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership or to discharge or in any other manner to discriminate against its employees in violation of Section 8 (a) (3) of the Act;

(b) Restraining or coercing employees of Westinghouse Electric Corporation (Sunnyvale Plant), its officers, agents, successors, and assigns, in the exercise of their right to engage in or to refrain from engaging in any and all of the concerted activities guaranteed to them by Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Notify Westinghouse Electric Corporation (Sunnyvale Plant) in writing that it withdraws its objections to the employment of Clyde W. Scheuermann and requests it to offer him immediate and full reinstatement to his former or a substantially equivalent position, without

prejudice to his seniority or other rights and privileges;

(b) Notify Clyde W. Scheuermann in writing that it has advised Westinghouse Electric Corporation (Sunnyvale Plant) that it withdraws its objections to his re-employment and requests it to offer him immediate and full reinstatement;

(c) Make whole Clyde W. Scheuermann for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the section entitled The Remedy;

(d) Post in conspicuous places in its business office at San Jose, California, where notices are customarily posted, copies of the notice attached hereto as Appendix A. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by the Respondent Union's official representatives, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material;

(e) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached hereto as Appendix A for posting, the

Employer willing, at its plant in places where notices to employees are customarily posted. Copies of said notice to be furnished by the Regional Director for the Twentieth Region, shall, after being signed by the Respondent Union's official representatives, be forthwith returned to the Regional Director for said posting;

(f) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from the date of this Order what steps it has taken to comply herewith.

(3) In the event that the Board's Order, heretofore set forth, is enforced by a decree of this Court, it is hereby further respectfully requested that the notice attached hereto and made a part hereof shall be amended by deleting therefrom the words "A Decision and Order," and there shall be inserted in their stead the words "A Decree of the United States Court of Appeals Enforcing an Order."

(4) On September 28, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(5) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evi-

dence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon so much of the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, representatives, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR
RELATIONS BOARD.

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 22nd day of May, 1952.

Appendix A

Notice to All Members of International Association of Machinists, Local No. 504, and to All Employees of Westinghouse Electric Corporation (Sunnyvale Plant).

Pursuant to
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not cause or attempt to cause Westinghouse Electric Corporation (Sunnyvale Plant) to discharge or in any other manner to discriminate against its employees in violation of Section 8 (a) (3) of the Act, or to discharge or in any other manner to discriminate against employees with respect to whom membership in our union has been denied or terminated upon some ground other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

We Will Not restrain or coerce employees of Westinghouse Electric Corporation (Sunnyvale Plant) in the exercise of their rights to engage in or to refrain from engaging in any or all of their concerted activities guaranteed to them by Section 7, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will Notify Westinghouse Electric Corporation (Sunnyvale Plant) in writing and furnish a

copy to Clyde W. Scheuermann, that we have withdrawn our objections to the employment of Scheuermann and that we request his reinstatement.

We Will make Clyde W. Scheuermann whole for any loss of pay he may have suffered because of the discrimination against him.

Dated .....

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504.
(Union)

By .....
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Endorsed]: Filed May 26, 1952.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly found that the Respondent Union violated the Act by causing the Company to discriminate against an employee to whom union membership had been refused for reasons other

than failure to tender periodic dues and initiation fees.

2. The Board properly found that by causing the Company to discriminatorily discharge its employee, Respondent thereby coerced and restrained the Company's employees in the exercise of rights guaranteed by the Act.

Dated at Washington, D. C., this 22nd day of May, 1952.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed May 26, 1952.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: International Association of Machinists, Local No. 504, Room 208, Temple Bldg., 45 Santa Teresa Street, San Jose, California, and Westinghouse Electric Corporation, Sunnyvale, California.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A., Title 29 (National Labor

Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 26th day of May, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on September 28, 1951, in a proceeding known upon the records of the said Board as "In the Matter of Westinghouse Electric Corp. (Sunnyvale Plant) and Clyde W. Scheuermann, an Individual, Case No. 20-CA-328," and "In the Matter of International Association of Machinists, Local No. 504, and Clyde W. Scheuermann, an Individual, Case No. 20-CB-102," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 26th day of May, in the year of our Lord one thousand nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Received May 27, 1952.
Returns on Service of Writ attached.
[Endorsed]: Filed June 5, 1952.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America

To: International Association of Machinists, 9th and Mt. Vernon Place, N.W., Washington, D. C.

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A., Title 29 (National Labor Relations Board Act, Section 10 (e)), you and each of you are hereby notified that on the 26th day of May, 1952, a petition of the National Labor Relations Board for enforcement of its order entered on September 28, 1951, in a proceeding known upon the records of the said Board as "In the Matter of Westinghouse Electric Corporation (Sunnyvale Plant) and Clyde W. Scheuermann, an Individual, Case No. 20-CA-328," and "In the Matter of International Association of Machinists, Local No. 504, and Clyde W. Scheuermann, an Individual, Case No. 20-CB-102," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth

Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 26th day of May, in the year of our Lord one thousand nine hundred and fifty-two.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed June 10, 1952.

[Title of Court of Appeals and Cause.]

RESPONDENT'S ANSWER AND CROSS-PETITION TO DISMISS PETITION FOR ENFORCEMENT OF AN ORDER OF NATIONAL LABOR RELATIONS BOARD

To the Honorable the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board's[1] Petition for Enforcement results from a consolidated complaint and proceeding and known upon the records of the Board as "In the Matter of Westinghouse Electric Corporation (Sunnyvale Plant) and Clyde W. Scheuermann, an Individual" (96 NLRB No. 71).

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[1]Hereinafter referred to as the Board.

In support of its answer to the Board's Petition, the Respondent respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within the judicial circuit, where the unfair labor practices are alleged to have occurred. Respondent admits that this Court, therefore, has jurisdiction of this Petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136.

(2) Respondent admits that the Board conducted the hearing and record thereof certified by the Board and filed with this Court herein.

(3) Respondent admits that the Board, on September 28, 1951, issued its Decision and Order in the matter before this Court for review.

(4) Respondent admits that the Board's Decision and Order was served upon it on September 28, 1951.

(5) Respondent denies that it has committed any unfair labor practices, either as indicated in the Petition for Enforcement or its Order or otherwise.

(6) Respondent asserts that the Board's findings of fact and conclusions of law that the Respondent violated Sections 8 (b) (2) and 8 (b) (1) (A) of the National Labor Relations Act, as amended, 61 Stat. 136, are not supported by substantial evidence on the record, as a whole.

As and for further answer and by way of Cross-Petition, the Respondent states as follows:

(1) That there is no substantial evidence on the record, as a whole, to support the Board's findings of fact and conclusions of law.

(a) That the Board improperly found that the Respondent violated the Act by causing the Company to discriminate against the employee to whom union membership was denied, for the reason that the Respondent's duty to decide Scheuermann's membership status was never put to a test.

(b) The Board's conclusion that Scheuermann's discharge was ostensibly for the reason of his non-payment of a fine is based on conjecture and surmise, and is unsupported by the record.

(c) There is no substantial evidence to support the finding that the Respondent would not have refrained from requesting Scheuermann's discharge even if he had timely offered dues and a new initiation fee.

(d) The Board's conclusion that a tender of dues by Scheuermann would have been a futile gesture is erroneous.

(e) The Board's conclusion that the Respondent's "true" motive for causing the discharge of Scheuermann was for the reason that he failed to pay his fine subsequent to expulsion from the Union is not supported by evidence on the record, as a whole.

(2) Sections 8 (a) (3) and 8 (b) (2) of the National Labor Relations Act show clearly that under

the circumstances of this case, Scheuermann had a legal obligation, under the Act, to tender periodic dues and initiation fees uniformly required as a condition of acquiring, or retaining, membership, or else fail to do so at his peril.

(3) Respondent states that Scheuermann's discharge was caused solely for the reason that he failed to comply with the provisions of a valid contractual agreement which required membership in the union on or after the 30th day of employment.

(4) The Respondent asserts that it had no illegal motive when it caused Scheuermann's discharge and that, therefore, such discharge was not an unfair labor practice within the meaning of the Act.

Wherefore, Respondent prays this Honorable Court take jurisdiction of the proceedings herein and make and enter an order and decree dismissing the Petition for Enforcement and Order of the Board, in its entirety, and to set aside and dismiss the Board's Decision and Order in the above matter.

/s/ PLATO E. PAPPS,
Counsel, International Association of Machinists.

Dated at Washington, D. C., this 14th day of June, 1952.

[Endorsed]: Filed June 16, 1952.

No. 13400

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL 504, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
BERNARD DUNAU,
THOMAS F. MAHER,
Attorneys,
National Labor Relations Board.

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In the United States Court of Appeals for the Ninth Circuit

No. 13400

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL NO. 504, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for the enforcement of its order issued against International Association of Machinists, Local No. 504, respondent herein, on September 28, 1951, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*).[1] This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred in Sunnyvale, California, within this judicial circuit.

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 18–22.

The Board's decision and order (R. 80–95) are reported in 96 N. L. R. B. 522.

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

The Board found that, in violation of Section 8 (b) (2) and (1) (A) of the Act, respondent Union caused the Westinghouse Electric Corporation (Sunnyvale Plant), hereinafter called the Company,[2] to discharge an employee pursuant to a union-security agreement, because the employee, previously expelled from the Union, did not pay a fine which the Union imposed upon him and which was the condition for his restoration to union membership. The subsidiary facts may be summarized as follows:

A. Scheuermann's expulsion from the Union

Clyde Scheuermann, an employee of the Company and its predecessor for approximately eight years, was a member of respondent Union from the time of its advent to the plant as exclusive bargaining representative (R. 55; 109–110, 169–170, 278–279). Shortly before the expiration of a closed-shop agreement between the Company and respondent on April 1, 1949, Scheuermann organized another union among the em-

[2] Westinghouse Electric Corporation is a Pennsylvania corporation maintaining its principal offices at Pittsburgh, Pennsylvania, and operating plants throughout the United States, including a plant at Sunnyvale, California. At this plant it is engaged in the manufacture of electrical and steam equipment. During the course of its operations it makes substantial purchases and sales outside the State of California (R. 19; 4, 107). Jurisdiction is not contested (R. 107).

ployees, the Independent Westinghouse Workers Union (IWWU). He became its first president and actively participated in a campaign to oust the respondent Union as the employees' representative (R. 20–21, 50; 110, 170–175).

On March 4, 1949, during the IWWU's organizing campaign, respondent notified Scheuermann that he had been charged with "dual unionism" in violation of the International constitution and would be required to stand trial for the offense (R. 50–51; 114, 116–118, 389).[3] A trial committee sustained the charge against Scheuermann and, after ratification of its decision by respondent's membership, notified him by letter on March 22, 1949, that he had been expelled from membership and fined $500 (R. 51, 82; 119, 256). On May 12, 1949, Scheuermann was notified that respondent's action had been approved by the Executive Council of the International (R. 52–53; 120).

In the meantime, however, during the latter part of March, Scheuermann attempted to pay his dues to Shop Steward Smiley, who refused them saying, "I can't take dues from you. I have been told not to" (R. 54–55, 82; 122, 193–194, 438). Shortly thereafter

[3] Art. XXV, Sec. 2 of the Constitution of the International Association of Machinists provides as follows:

"Any member or members of any local lodge who attempt to inaugurate or encourage secession from the Grand Lodge or any local lodge, or who advocate, encourage, or attempt to inaugurate any dual labor movement or who violate the provisions of the Constitution of the Grand Lodge or the Constitution for Local Lodges * * * shall, upon conviction thereof, be deemed guilty of conduct unbecoming a member and subject to fine or expulsion, or both" (R. 383).

another shop steward, Nunez, accepted this payment of dues and on March 31 remitted it to the union treasurer (R. 55; 121, 194, 438–439). Scheuermann made a final payment of dues at the Union office on May 2 (R. 55; Resp. Union Exhib. 7). All these payments were returned to Scheuermann by respondent on June 3, 1949, with a letter advising him that because he had been officially expelled from membership and fined $500, he was "therefore not a member of the International Association of Machinists" and dues could not be accepted from him (R. 55–56, 82; 121–123).

B. The representation and union-shop elections and subsequent contract negotiations

Meanwhile, on April 1, 1949, respondent's contract with the Company expired (R. 52; 279, 311). Thereafter on June 13, 1949, the Board directed that an election be held which would determine whether the Company's employees wished to continue respondent Union as their choice, or select the recently organized IWWU (R. 56; 325). At the election held on July 7, 1949, respondent won and was again certified as the statutory bargaining representative (R. 56; 157–158). The IWWU disbanded shortly thereafter (R. 56; 174–175).

In August 1949 respondent and the Company began negotiations for a new agreement (R. 56; 281–282). On August 25 a majority of the employees voted in a Board-conducted election to authorize respondent Union to negotiate a union-shop contract with the Company (R. 56; 141, 158). The results of this election were certified by the Board on September 7,

1949 (R. 57; 142, 282).[4] Meanwhile negotiations progressed satisfactorily, and by the end of September substantial agreement had been reached between the parties (R. 57; 155, 282). The final agreement was officially ratified by respondent's membership at a special meeting on October 9, 1949, and was formally executed on the following day (R. 57; 281, 390).

The agreement included a union-security provision requiring that all employees in the bargaining unit, as a condition of their continued employment by the Company, be or become members of respondent Union within thirty days after the effective date of the agreement.[5] Copies of the agreement, although not

[4] Recent amendments to the Act now make such an authorizing vote of the employees unnecessary. Public Law 189, 82d Cong., 1st Sess.

[5] The full text of the union-security provision of the agreement is as follows:

"SECTION II—UNION SECURITY

"A. All employees in the bargaining unit described in Section I shall on and after the thirtieth day following the beginning of their employment, or October 10, 1949, whichever is the later, become and remain members of the Union, as a condition of their employment during the life of this agreement, and the Union shall notify the Company promptly in writing of the failure of any such employee to become or remain a member of the Union; provided, however, that the Union shall not request the company to discriminate against any employee for nonmembership in the Union if such membership is not available to the employee on the same terms and conditions generally applicable to other members or if membership is denied or terminated for reasons other than the failure of the employee to tender the periodic dues or initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership" (R. 57; 282, 126).

The foregoing provision from the collective bargaining agreement is printed here because the printer inadvertently omitted it

posted, were given immediately to all Company supervisors and Union stewards (R. 58; 284). The Board found that Scheuermann was familiar with the union-security provision of the agreement (R. 59–60).

C. The nature of Scheuermann's union status at the time of his discharge

As previously stated (*supra,* pp. 3–4), Scheuermann had made a number of attempts to pay his union dues after his expulsion, but on each occasion his tender was rejected (R. 53–55, 82–83; 121, 192–194, 438). Another employee, Leslie Ollis, who had also been fined and expelled from the Union at the same time as Scheuermann, and for the same reasons, had also sought to pay his union dues and had likewise been refused (R. 53–55, 84–85; 142, 150, 152–153, 157, 241, 256, 375, 389–390). Between April 1 and October 10, however, neither Ollis nor Scheuermann were under any obligation to seek or maintain union membership as a condition of continued employment because no union-security agreement was in force (R. 68; 280). Ollis' final attempt to pay his dues occurred shortly after the execution of the union-security agreement (R. 83; 145–146, 150–151). This time, in the presence of Scheuermann and two other employees, he asked Union Steward Smiley to accept his union dues (R. 60–61, 83; 142–145, 150–152, 160, 448). But Smiley, who had previously refused Scheuermann's offer of payment (*supra,* p. 3), replied, "You know

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from the printed record. The agreement was introduced into evidence as General Counsel Exhibit 1–j appendix A, and the portion quoted above was included in the Board's designation of parts of the record to be printed.

I can't take dues from you guys" (*ibid.*).[6] Ollis was laid off by the Company shortly thereafter, and accordingly the terms of the union-security agreement were not invoked against him as they were against Scheuermann (R. 60; 145, 151, 160).

D. The discharge of Scheuermann

On November 11, 1949, immediately following the expiration of the thirty day grace period specified by the union-security agreement for the acquisition of membership, respondent's business agent, Franklin Gorham (R. 197), met with the Company's industrial relations manager, B. H. Goodenough (R. 62; 196, 286). He presented the manager with respondent's written request that the Company terminate Scheuermann's employment because he had failed to comply with the union-security provision of the agreement

[6] Ollis' account of this incident was as follows:

"I offered to pay dues to Smiley at that time and I offered, I believe I phrased it, that we were willing to pay dues at any time, or possibly I said I am willing to pay dues, but I recall very definitely Smiley saying, as he had said before, 'You know, we don't want any dues from you guys' " (R. 151).

Scheuermann's testimony was in substantial accord, thus:

"There was an incident of kidding about 'free riders.' It perturbed Ollis and he said, 'How about it, Smiley? How about taking some dues now?' Smiley said, 'You know I can't take dues from you guys.' There was some bantering and that was the end of it" (R. 144).

Employee Nelson, whom the Trial Examiner found to be one of the most disinterested witnesses to the incident, testified that Ollis, in the presence of Scheuermann, "offered to pay dues," and that "Smiley's stand was the same every time; that under the I. A. of M.'s business laws there was a fine imposed and he couldn't pay them. He couldn't accept the dues" (R. 61; 445). However, Nelson could not remember the exact conversation (R. 448).

(R. 62, 83; 286, 314–315, 392–393).[7] Gorham assured Goodenough that Scheuermann and the other employees whose discharges were requested "had been given the same opportunity to join the Union as all other employees under the jurisdiction of the IAM," and that the request for their discharges complied with both Section 2 of the agreement and the National Labor Relations Act (R. 62; 287, 315). Gorham later confirmed these assurances in a letter dated November 15, 1949, in which he stated that "all of those listed in this letter for termination were given the same opportunity to become members of our organization as anyone else working in [the] plant" (R. 63; 289, 393).

When Scheuermann reported for work on November 11, he was sent directly to Mechanical Superintendent John J. McAuliffe who read him respondent's request for his discharge and the pertinent provisions of the agreement upon which the discharge was requested (R. 63, 83; 8–9, 123–124, 126, 176–177, 326, GC Exhibit 1–J, Appendix A, Sec. 2). After reading both the letter and the contract Scheuermann protested to McAuliffe, "I don't think this applies to me. * * * Because I feel mine is a special case"

[7] The text of respondents request is as follows:

"We are requesting Westinghouse Electric Corporation, Sunnyvale plant, to terminate the employment of Louis G. Gennai, Cleveland A. Norris and Clyde W. Scheuermann for failure to comply with Section 2 of the Agreement between Westinghouse Electric Corporation, Sunnyvale plant, and District Lodge #93, International Association of Machinists" (R. 125).

The name of Gennai had been deleted as an error (R. 124, 290–291, 426); Norris terminated his employment for other reasons (R. 292).

(R. 63; 126–127, 178). He then explained to McAuliffe that it had been impossible for him to comply with the union-security requirements for the reason that he had been fined and expelled from the Union (R. 63; 178). After further discussing the applicability of the contract McAuliffe again referred to respondent's request and the Company's decision to grant it, and gave Scheuermann his discharge papers (R. 64, 83; 128–129).

E. Scheuermann's final attempt to secure reinstatement to union membership

Following his discharge Scheuermann again sought to be reinstated in the Union as an incident to regaining his employment. On November 14 he went to respondent's office and spoke with Business Agent Scott on the matter (R. 64, 83; 129–130, 199). When Scheuermann told Scott he "was out to * * * see what we could do about my being laid off at Westinghouse," Scott replied, "Yes, Clyde, I think we can do something. You pay your back dues and your new initiation fee and the $500 fine" (R. 64–65, 83; 132, 189–190). Scott thus made it clear to Scheuermann that unless the fine, as well as the back dues, were paid he could not be restored to good standing in the Union. Scott's decision comports with the terms of the Union's constitution which require that an expelled member pay a reinstatement fee, and that his "reinstatement shall not be effected * * * until * * * the fines and assessments are either remitted or paid in full" (R. 85; 384, 388). Scott, however, disclaimed knowledge of the details of Scheuermann's case and suggested that he see Business Agent Gor-

ham who had made the original charges against him and had procured his discharge (R. 65; 133, 190, 456). Gorham conferred with Scheuermann on the following day, but refused to accept his application for reinstatement in the Union (R. 66; 135–136, 190–191, 406). He explained that his refusal was dictated by the Union's policy not to accept membership applications from applicants who, like Scheuermann, were unemployed (R. 66; 395, 404).

F. The Board's conclusions

The Board found that respondent requested the Company to discharge Scheuermann pursuant to the union-security agreement because Scheuermann had failed to pay the fine imposed on him by respondent for engaging in dual union activity (R. 82–87). The Board's conclusion was based on the circumstances that: (1) Scheuermann's several tenders of dues after his expulsion from membership in the Union were rejected because of his non-payment of the fine (R. 86); (2) during the period that the union-security agreement was in effect, in Scheuermann's presence, another employee, who had been expelled with Scheuermann from the Union for the same reason, tendered dues to the Union, but his tender was rejected (R. 83, 86); (3) after Scheuermann's discharge pursuant to the union-security agreement, the Union advised him that his restoration to membership in good standing was conditioned upon his paying the fine (R. 85–86); and (4) the Union's constitution requires that no expelled member shall be reinstated until his "fines and assessments are either

remitted or paid in full," and the Union had indicated no intention to remit the fine against Scheuermann (R. 86).

The Board concluded that, under Section 8 (a) (3) and 8 (b) (2) of the Act, a union-security agreement may be lawfully invoked to cause the discharge of an employee only for his failure to tender his periodic dues and initiation fees, and accordingly that respondent Union, in invoking the union-security agreement, to cause the discharge of an employee for his failure to pay a union fine,[8] violated Section 8 (b) (2) and (1) (A) of the Act (R. 87).[9] The Board further concluded that it was immaterial that Scheuermann had not tendered the periodic dues and initiation fees during the thirty-day period prescribed by the union-security agreement for acquiring membership because the Union had shown "by affirmative conduct and statements that tender would not have stayed its request for discharge," and it was not incumbent upon Scheuermann to make a tender "where the circumstance indicate that such a tender would have been a futile gesture" (R. 86).[10]

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[8] Since the Union's action was based on non-payment of the fine, the Board assumed, without passing upon the question, that the Union could lawfully require Scheuermann to tender a second initiation fee (R. 86, n. 7). Accordingly, this requirement is not in issue here.

[9] The Board, with one Member dissenting (R. 95–96), dismissed the complaint with respect to the Company, because the Company "had no reasonable grounds for believing that the Union's request was for reasons" other than those permitted by the Act, and therefore it had not discriminated against Scheuermann in violation of Section 8 (a) (1) and (3) (R. 87–89).

[10] Two members of the Board dissented from this conclusion (R. 97–99).

II. The Board's order

The Board's order (R. 92–95) requires respondent to cease and desist from causing or attempting to cause the Company to discharge or in any other manner to discriminate against the employees in violation of the Act, and from restraining and coercing employees of the Company in the exercise of their rights guaranteed by the Act. Affirmatively, respondent is required (a) to make whole Clyde Scheuermann for any loss of pay he may have suffered as the result of discrimination;[11] (b) to notify the Company in writing that it withdraws its objection to the employment of Scheuermann, and that it requests the Company to offer him reinstatement to his former position; (c) to notify Scheuermann that it has withdrawn its objection to his reemployment and requested his reinstatement; and (d) to post appropriate notices of compliance with the Board's order.

SUMMARY OF ARGUMENT

Based on substantial evidence on the record considered as a whole, the Board reasonably found that respondent caused the discharge of Scheuermann pursuant to a union-security agreement because of his failure to pay a fine; that any tender of dues or initiation fees by Scheuermann would have been a futile

[11] The Trial Examiner in his Intermediate Report recommended the dismissal of the complaint with respect to respondent as well as the Company. Accordingly, the Board, in reversing the Trial Examiner and finding violations as to respondent, has excluded from the computation of back pay due to Scheuermann the period from the date of the Intermediate Report to the date of the Board's order (R. 90).

act which he was not obligated to make; and accordingly, that respondent violated Section 8 (b) (2) and (1) (A) of the Act.

ARGUMENT

The Board properly concluded that respondent, by invoking the union-security agreement to cause the discharge of employee Scheuermann because of his nonpayment of a fine, violated Section 8 (b) (2) and (1) (A) of the Act

Under Section 8 (a) (3) and (b) (2) of the Act, a union-security agreement may be invoked to cause the discharge of an employee for nonmembership in a union only if the employee fails to tender periodic dues and initiation fees. *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815. In the statutory language, if nonmembership is "for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring membership," a discharge may not be validly based on such lack of membership. A fine imposed by a union is clearly not within the class of "periodic dues and initiation fees;" hence it is discriminatory to invoke a union-security agreement against an employee because of his failure to pay a fine. *Electric Auto-Lite Co.,* 92 N. L. R. B. 1073, enforced, 196 F. 2d 500 (C. A. 6). Indeed, in the case at bar the fine was imposed because the employee engaged in dual union activity. Yet a principal reason inducing Congress narrowly to circumscribe the enforceability of a union-security agreement was to permit an employee to engage in activity on behalf of a rival union without risk of reprisal. S. Rep.

No. 105, 80th Cong., 1st Sess., 21–22; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44. Accordingly, inasmuch as respondent invoked the union-security agreement against employee Scheuermann because he failed to pay a fine, respondent violated Section 8 (b) (2) of the Act. By the same token, respondent also violated Section 8 (b) (1) (A) of the Act, for it, in conjunction with Section 7, prohibits a labor organization from restraining or coercing an employee in the exercise of his right to refrain from union-membership and activity, and this right may be abridged only through the valid enforcement of a union-security agreement.

The question, therefore, narrows to whether substantial evidence on the whole record supports the Board's finding that, "in asking the Company to discharge Scheuermann ostensibly because he failed to tender dues and initiation fee, the Union in reality asked for and obtained Scheuermann's discharge because of his nonpayment of the fine, a reason which the Act does not countenance" (R. 86). Because of his "dual unionism," Scheuermann was expelled from the Union and fined $500 (*supra,* p. 4). Before entry into the union-security agreement, Scheuermann's tender of dues was twice rejected by the Union (*supra,* pp. 3–4). Another employee, Ollis, expelled from the Union at the same time as Scheuermann, and for the same reason, likewise had his tender of dues refused (*supra,* p. 6). Thereafter, during the thirty-day grace period prescribed by the union-security agreement for the acquisition of union membership, Ollis again sought to pay his dues, but,

as before, in Scheuermann's presence, the Union's steward rejected the tender, explaining "you know I can't take dues from you guys" (*supra,* pp. 6–7). After his discharge, Scheuermann asked the Union's business agent, Scott, "what we could do about my being laid off," and Scott replied, "I think we can do something. You pay your back dues and your new initiation fee *and the $500 fine"* (*supra,* p. 9). [Emphasis supplied.] Finally, in refusing to accept a tender of dues without payment of the fine as sufficient to effect Scheuermann's restoration to good standing, the Union was acting in strict conformity with its constitution providing that "reinstatement shall not be effected * * * until * * * the fines and assessments are either remitted or paid in full" (*supra,* p. 9). The action of the Union's officials is consistent only with the conclusion that the Union was unwilling to forgive the fine but was requiring that it be "paid in full."

Accordingly, the Board reasonably concluded that the Union invoked the union-security agreement against Scheuermann, not because he failed to tender dues and initiation fees during the thirty-day grace period prescribed by the agreement for acquiring union membership, but because he had not paid the fine assessed against him. Scheuermann's tender of dues had been uniformly rejected before entry into the agreement; during the thirty-day period of the agreement another employee, who was in the same situation as Scheuermann, had his tender rejected in Scheuermann's presence; after Scheuermann's discharge, the Union expressly specified payment of the

fine as necessary to his restoration to good standing; and the Union's action was consistent with the course prescribed by its constitution.[12] It was the collection of a fine, not of dues, which motivated the Union in causing Scheuermann's discharge pursuant to the union-security agreement.

Respondent Union contends, however, that even if it would not have accepted Scheuermann's tender of dues, he was nevertheless obligated to make it during the thirty days specified by the agreement, and he failed to do so. But, as the Board properly found (R. 86), there is no obligation to tender dues "where such a tender would have been a futile gesture." Since the evidence clearly shows that it was the payment of the fine which was the decisive consideration to the Union, it cannot insist upon the formal fulfillment of a condition which in any event would not have satisfied it. The "law compels no man to do a useless act."[13]

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[12] It is clear that the events preceding and following the thirty-day grace period, no less than those occurring during the period, are relevant in ascertaining the reason for the Union's conduct. Cf. *N. L. R. B.* v. *Wallick & Schwalm Co.*, 30 LRRM 2529, 2533 (C. A. 3, August 1, 1952); *Angwell Curtain Co.* v. *N. L. R. B.*, 192 F. 2d 899, 903 (C. A. 7). The only sound rule in limiting the use of the past and future in determining motive is the rational probative force which is evinced in the circumstances.

[13] *Mayne's Case*, 5 Coke, 20 b. Compare the contract rule that where the promisor is himself the cause of the failure to perform a condition, he cannot set up such non-performance as a defense. *Tradewell Foods, Inc.* v. *N. Y. Credit Men's Adjustment Bureau, Inc.*, 179 F. 2d 567, 568 (C. A. 2); *Williston, Contracts*, Rev. Ed., Secs. 676, 677, 698a, 832, 1293a, 1298; 17 C. J. S., Contracts, Sec. 468b.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full.

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SEPTEMBER 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V. Sec. 151, *et seq*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8

(a) of this Act as an unfair labor practice), to require as a condition of employment, membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (*ii*) *if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.*[1]

* * * * *

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in

[1] The italicized portion has been eliminated by amendment since these proceedings were instituted, see pp. 21–22, *infra.*

violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than has failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;

* * * * *

SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate tem-

porary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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Sec. 18.[2] * * *

* * * * * *

SEC. 18. (b) Subsection (a) (3) of section 8 of said act is amended by striking out so much of the first sentence as reads " ; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding

[2] Section 18 was created by Public Law 189, 82d Cong., 1st sess., enacted October 22, 1951.

12 months received from the Board a notice of compliance with section 9 (f) (g), and (h) and (ii) unless following an election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

U. S. GOVERNMENT PRINTING OFFICE: 1952

No. 13400

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL NO. 504

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BRIEF FOR THE RESPONDENT

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL NO. 504

PRELIMINARY STATEMENT

The Respondent Union does not dispute the description of the Board's findings and conclusions (Board's Brief, p. 2, 10 and 12), and its statement of the subsidiary facts as set forth in its Brief (p.2 to 10).

SUMMARY OF ARGUMENT

The points upon which the Respondent takes issue with the Board's findings and conclusions are as follows:

I. Whether there is substantial evidence to support

the Board's inference that: (1) the Union never intended, during the period of time when the union security contract here involved was in effect, to admit Scheuermann *to membership* in the Union unless he paid the fine; and (2) the Union would have requested *his discharge* in any event, had he made the tender of dues and initiation fees required by the *express* provisions of the contract: [1] and,

II. Even if it be assumed that the Board could validly find that the Union would not have *accepted* such dues and initiations fees, in the absence of a concurrent tender of the fine, as being sufficient to comply with intra-union *membership* rules for acquisition of *membership*, such showing does not warrant the inference that the Union would nevertheless have demanded Scheuermann's discharge. Indeed, such evidence as there is leads to a contrary implication.

ARGUMENT

I. The evidence does not preponderate in favor of a finding that the Union would not have taken Scheuermann into membership even if he had tendered the dues and initiation fees.

The Board's unfair labor practice "case" rests almost wholly upon a subsidiary finding, reflecting an inference drawn from the facts, that the Union made known to Scheuermann that it did not intend to and would not have admitted Scheuermann to *membership*

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[1] The provisions of the contract relating to the conditions under which the union membership shall affect employment are—as set forth in the Board's Brief, footnote 5, page 5—cast in language which is almost identical to that contained in Proviso (B) of Section 8(a)(3) of the Act (Appendix 1). The Board's decision implicitly finds that the contract is valid in all respects.

at the time here material, unless he offered to pay the fine. From this inference the Board further concluded that, as the Union had made known to Scheuermann that it would not admit him to membership, Scheuermann's tender of dues and initiation fees—without a concurrent tender of the fine—would have been a "futile" gesture; and that, accordingly, such "futility" constituted a legal "excuse" for his conceded failure to make the tender he knew to be required by the express provisions of the contract, as a condition of retaining *employment*. The Board's reasoning and argument is unsound because, as it will be shown hereinafter, Scheuermann was not discharged "because of his nonpayment of a fine"; but rather because he had failed to comply with the said provisions of the contract *by not tendering* his initiation fees and dues.

It is submitted that if Scheuermann was required to make a tender, his failure to do so—and it is not denied that he failed to do so during the only period under the contract (October 10th through November 11th) in which he was required to make a tender—would justify the Union in causing his discharge, and would justify a reversal of the Board's opinion.

The error in the foregoing findings of the Board so far as they go to the Union's intent to deny Scheuermann membership unless he paid the fine is the attribution to Scheuermann of *knowledge* that the Union so intended.[2] In attributing such knowledge to Scheuermann, the Board has resorted wholly to surmise and conjecture.

For assuming, *arguendo*, that the Union would not

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[2] We do not concede that the record will establish that the Union did in fact have such intent. But in any event, we maintain that the existence of such intent is immaterial.

have granted him membership in the Union unless he paid his fine, Scheuermann would have had to know of that undisclosed intent on the part of the Union.[3] Furthermore, the Board would have to rely on a further assumption that Scheuermann's failure to offer his dues and initiation fees would have been caused because of this undisclosed intent on the part of the Union. In other words, the majority of the Board is basing assumption upon assumption and does that in relation to an alleged intent which had not even been disclosed by the Union. Because of the importance of this point, I may be excused to reiterate that the majority of the Board assumed: (1) that during the period between October 10th and November 11th, the Union had the intent to prevent Scheuermann from becoming a member because of nonpayment of a fine; (2) on the basis of that assumption, they base another assumption, namely, that Scheuermann *knew* of this assumed intent on the part of the Union which had not yet even been disclosed, until after the said 30 day period; and (3) finally, on the basis of the second assumption, the majority made a third assumption; namely, that Scheuermann refrained from making a tender because of this undisclosed intent on the part of the Union. But nowhere in the 30 day crucial period between October 10, 1949 and November 11, 1949, is there any evidence that would indicate that the Union *required* the payment of the fine as a condition of *con-*

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[3] The body of union rules to which the Board refers in part in its findings does not preclude the possibility that the fine would have been waived, had application been made by Scheuermann at the time immediately preceding his discharge.

tinued employment. Nor is there any evidence that membership was denied him in the Union during this 30 day period because of the nonpayment of the fine for the reason that he never *applied.*. For the reasons stated above, the Board's findings in this regard should be reversed.

II. The evidence does not preponderate in favor of a finding that even if Scheuermann had tendered his dues and initiation fees the Union would have requested his discharge.

In this portion of the argument we assume without conceding, that the evidence will support a finding that the Union would not in fact have admitted Scheuermann to membership without the payment of the fine and that such a fact was known to Scheuermann. We maintain, however, that this finding would not support a conclusion that, what the Union told Scheuermann, in effect, was "it is useless for you to make any effort to meet your obligation *under the contract*, of *tendering* your initiation fees and dues, because whether you do so or not, we are going to seek your *discharge*, and the Employer is required to honor our demand under the contract." Nothing in the record even remotely supports such a conclusion. For it is conceded—and the Board so found—that Scheuermann knew what the contract provided. It is indisputable that all the contract says to any employees aware of its provisions is "what you are required to do in order to retain your employment is to tender your initiation fees and dues, and this is all." It does not say that "if you make such tender and the Union refuses the tender and will not accept you as a member, it will nevertheless seek your discharge." Indeed, the contract provisions clearly say otherwise.

In such circumstances, the Board's grant of an "excuse" to an employee from compliance with dues and initiation fees tender provisions of a valid contract is purely gratuitous. But more, the use of such an "excuse" doctrine as a premise for an 8(b)(2) finding, has the effect of: (1) either forbidding a union from adopting any rules restricting its membership; or (2) requiring a union to make known to every employee covered by a valid union shop contract that his tender of dues and initiation fees guarantees him *membership* —as distinguished from *employment.* But this would be contrary to the clear intent of the Act, that unions shall be free to deny *membership* to anyone for any reason whatsoever, so long as the right *to work* is not affected. This is clearly indicated by the proviso to Section 8(b)(1)(A) of the Act which states: ". . . . *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." For as the Board said in interpreting the proviso in *International Typographical Union et al,* (86 NLRB 951, 957):

> "In our view, by including this *proviso,* Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of 8(b)(1)(A)* irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees."

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* . . . . It is unnecessary to more than mention that the guarantee of a right to "prescribe" rules extends to the enforcement of such rules as well."

If it is valid to establish intra-union rules which deny membership, then it is valid to publish such rules.

And exercise of such right should not be automatically equated to exercise of a *power* to cause denial of employment. So that what the Board here is doing, is *not* applying the provisions of the Act as written, but rather it is legislating new provisions.

It is nowise established by the record that had Scheuermann made his tender of dues and initiation fees, at the proper time, that the Union would nevertheless have caused the denial of his employment.

It is submitted that whatever facts the Board has resorted to in adopting such a premise, must be weighed in the light of certain presumptions to which the Union is justly entitled; namely, (1) that the Union knew the provisions of the Act; (2) that the Union would not willfully violate the Act; and, (3) that a discharge caused by a union under color of a union security contract after refusal of dues and initiation fees properly tendered constitutes an unfair labor practice.[4] In fact no presumptions need be made as to the first premise because the express provisions of the contract repeat the express provisions of the Act.

What facts did the Board have before it? Simply these. That Scheuermann was expelled from the Union and fined five hundred dollars seven months before his discharge; that he made several tenders of dues at times preceding the execution of the union shop agreement here involved; that during the pertinent 30 day period, another employee (Ollis) who had been expelled from the Union at about the same time as

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[4] *Union Starch and Refining Co., vs N.L.R.B.*, 186 F 2d. 1008 (CA.7) certiorari denied, 342 U.S. 815; *Electric Auto Lite Co.*, 92 N.L.R.B. 1073, enforced 196 F. 2d. 500 (C.A.6); *The Eclipse Lumber Company*, 95 N.L.R.B. No. 59; *Pen and Pencil Workers Union, Local 19593, AFL*, 91 N.L.R.B. No. 155.

Scheuermann offered to pay dues, and was told by Smiley, the Union Steward, "you know I can't take dues from you guys"; that the Union did not request Ollis' discharge, nor did any of its agents, imply to him or to anyone else that such discharge would be requested; that under the union rules it could not legally accept dues from any person who was not a union member and whose tender of dues did not also include a tender of initiation or reinstatement fees; that Scheuermann *never* tendered dues or initiation fees either in fact or by implication during the crucial 30 day period provided for under the contract; that the contract was valid; that Scheuermann was discharged at the Union's request, and was told by the Employer at the time, that such request was based on his *failure to tender dues and fees;* that several days *after* his discharge, Scheuermann sought membership in the Union, and the Union then told him he could obtain such membership if he paid initiation fees, dues and the fine imposed on him seven months before.

Upon these facts, the inference that the motivation for discharge, was Scheuermann's failure to tender the *amount of the fine* during his period of employment rests wholly on what occurred after Scheuermann's employment was terminated. At such time—as Scheuermann was not an employee—the Union's demand for payment of the fine as a condition of *membership* was an act reflecting a matter purely between Scheuermann and the Union—unregulated by the Statute. [5]

[5] *Standard Brands, Incorporated,* (97 N.L.R.B. No. 102); wherein the Board said with regard to belated tenders of employees who had been discharged—"The fact that the Union refused to permit them to membership, while allowing automatically suspended members who were less seriously delinquent to do so, *did not render the discharge of complainants unlawful.*"

Finally, assuming *arguendo*, as the Board contends in its Brief (p. 16) that the "payment of the fine was the decisive consideration to the Union", such consideration was only for the condition of acquiring *membership* in the Union, but was not the decisive consideration for Scheuermann's retaining employment at the Employer's plant. That last consideration was the requirement of an offer of a tender of initiation fees. Having failed to make such a tender, Scheuermann was foreclosed from the protection afforded him by the Act. [6]

In conclusion, performance of the duty required by the contract permitted by the Statute; namely, "tender" is so simple and takes such an infinitesimal amount of effort and time, that it is most reasonable to require its performance as a condition of effective assertion of an 8(a) (3), 8(b) (2) charge. Although it may be conceded that the violation of the Act may be found even if tender is not made, such finding should be predicated on very clear and convincing evidence that the party charged with the violation *actually precluded* the making of the "tender in order to effect the discharge complained of." Such finding here is based upon no more than a mere scintilla of evidence arrived at by resort to "assumption upon assumption", and is bolstered by a statement of a legal principle very general in nature; namely, that the "law compels no man to do a useless act." [7]

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[6] Compare *Union Starch and Refining Co., vs NLRB, supra; Electric Auto Lite Co.,*[4] *supra,* distinguishable on their facts because in those cases a tender was actually made by the employee, who was then subsequently discharged.

[7] *Mayne's Case,* 5 Coke, 20 b.

CONCLUSION

It is respectfully submitted that the Board's findings and conclusions are not supported by substantial evidence, that its order is invalid and improper, and a decree should issue denying, *in toto*, the Board's petition for enforcement.

PLATO E. PAPPS,
COUNSEL
International Association of Machinists, Local No. 504

OCTOBER, 1952

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V. Sec. 151, *et seq*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice), to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) *if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.* [1]

[1] The italicized portion has been eliminated by amendment since these proceedings were instituted.

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

No. 13403

United States
Court of Appeals
for the Ninth Circuit

WEST COAST FAST FREIGHT, INC.,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13403

United States
Court of Appeals
for the Ninth Circuit

WEST COAST FAST FREIGHT, INC.,
a corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 33063

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a corporation,

Defendant.

INFORMATION

The United States Attorney charges:

Count 1.

On or about the ninth day of September, 1950, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 270 boxes of detonating fuses, by motor vehicle on public highways from Oakland, California, to Seattle, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $771.40, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 2.

On or about the sixteenth day of October, 1950, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including 45 pallets explosive projectile for cannon, by motor vehicle on public highways from Oakland, Calif., to Pomona, near Yakima, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $1121.22, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 3.

On or about the third day of November, 1950, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 14 boxes of rocket ammunition with empty projectiles, by motor vehicle on public highways from Oakland, California, to Fort Lewis, near Tacoma, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $737.20, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the

Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 4.

On or about the tenth day of November, 1950, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 540 boxes ammunition for cannon with explosive projectiles, by motor vehicle on public highways from Oakland, California, to Fort Lewis, near Tacoma, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $743.80, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 9.

On or about the seventeenth day of December, 1950, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 543 boxes hand grenades, by motor vehicle on public highways from Oakland, California, to Portland, Oregon, for the Sierra Ordance Depot,

for compensation, in the amount of $695.40, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 12.

On or about the seventeenth day of April, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 500 cases ammunition for cannon with explosive projectiles by motor vehicle on public highways from Oakland, Calif., to Fort Lewis, near Tacoma, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $752.40, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 13.

On or about the eighteenth day of April, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did trans-

port a shipment of dangerous explosives, including, 675 boxes ammunition for cannon with explosive projectiles, by motor vehicle on public highways from Oakland, California, to Pomona, near Yakima, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $786.60, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 14.

On or about the twentieth day of April, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 210 boxes ammunition for cannon with explosive projectiles, by motor vehicle on public highways from Oakland, California, to Pomona, near Yakima, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $786.60, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 15.

On or about the twenty-sixth day of April, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did,

knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 246 boxes ammunition for cannon with explosive projectiles, by motor vehicle on public highways from Oakland, California, to Pomona, near Yakima, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $786.60, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 16.

On or about the twenty-seventh day of April, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 1,084 cases ammunition for cannon with explosive projectiles, by motor vehicle on public highways from Oakland, California, to Pomona, near Yakima, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $786.60, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 17.

On or about the sixth day of May, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 232 boxes rocket ammunition for cannon with empty projectiles, by motor vehicle on public highways from Oakland, California, to Seattle, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $752.40, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 19.

On or about the nineteenth day of April, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and as such carrier, did transport a shipment of dangerous explosives, including, 615 boxes ammunition for cannon with explosive projectiles, by motor vehicle on public highways from Oakland, California, to Pomona, near Yakima, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $786.60, without there being in force with respect to defendant a certificate of public convenience and necessity is-

sued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a))

Count 20.

On or about the first day of May, 1951, in the Northern District of California, Southern Division, West Coast Fast Freight, Inc., defendant, did, knowingly and wilfully, engage in an interstate operation on a public highway, as a common carrier by motor vehicle, and, as such carrier, did transport a shipment of dangerous explosives, including, 18 boxes of black powder, by motor vehicle on public highways from Oakland, California, to Seattle, Washington, for the Sierra Ordnance Depot, for compensation, in the amount of $752.40, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.C.S. 306(a))

[Endorsed]: Filed Oct. 25, 1951.

United States District Court for the
Northern District of California
Southern Division

At a stated term of the United States District Court for the Northern District of California, Southern Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the seventeenth day of April in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

(Order Denying Motion for Judgment of Acquittal and Motion to Strike;

Finding of Guilty on Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19 and 20 of Information;

By Stipulation, Ordered Counts 5, 6, 7, 8, 10, 11, 18, 21, 22, 23, 24 and 25 of Information be Dismissed.)

The parties hereto being present as heretofore, the further trial of this case was this day resumed. After further arguments by respective counsel, It Is Ordered that defendant's motion for judgment of acquittal and motion to strike be, and each is hereby, Denied.

* * * *

After arguments by respective counsel, it is the Finding of the Court that the defendant is Guilty as charged in Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19 and 20 of the information. Ordered that defendant pay a fine of One Hundred Dollars ($100.00) on each of said Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19 and 20—(Total fine imposed Thirteen Hundred Dollars ($1300.00)). Ordered that the defendant be granted a five (5) day stay of execution of judgment.

By stipulation, Further Ordered that Counts 5, 6, 7, 8, 10, 11, 18, 21, 22, 23, 24 and 25 of information be dismissed.

* * * * *

United States District Court for the Northern District of California,
Southern Division

No. 33063

UNITED STATES OF AMERICA

vs.

WEST COAST FAST FREIGHT, INC., a corporation.

JUDGMENT AND COMMITMENT

On this seventeenth day of April, 1952, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon its plea of Not Guilty (entered by I. W. Shepard, Secretary of the defendant corporation), and a Finding of Guilty of the offense of violations of Title 49, United States Code, Section 306(a)—(Defendant, West Coast Fast Freight, Inc., a corporation, a common carrier by motor vehicle, on or about September 9, 1950, and various dates thereafter, in the Northern District of California, Southern Division, did knowingly and wilfully engage in transportation of property (dangerous explosives, etc.) by motor vehicle in interstate commerce on a public highway for compensation, without a certificate of public convenience and necessity having been issued by the Interstate Commerce Commission authorizing such interstate operations, as charged in

Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19, and 20 of information; and the court having asked the defendant whether it has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby sentenced to pay a fine to the United States of America in the sum of One Hundred Dollars ($100.00) on each of Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19, and 20 of the information. (13 counts.)

Total fine imposed—One Thousand Three Hundred Dollars ($1,300.00).

(Information consisting of 25 counts. Counts 5, 6, 7, 8, 10, 11, 18, 21, 22, 23, 24, 25 of information heretofore ordered dismissed.)

(Defendant granted a stay of execution of judgment to April 24, 1952.)

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Examined by:

/s/ CHARLES ELMER COLLETT,
Assistant U. S. Attorney.

Judgment and Commitment filed and entered this seventeenth day of April, 1952.

C. W. CALBREATH,
Clerk,
/s/ By L. R. PETTIGREW,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: West Coast Fast Freight, Inc., 650 Hanford Street, P. O. Box 3026, Seattle 14, Washington.

Name and address of appellant's attorney: Glanz & Russell, 639 South Spring Street, Los Angeles 14, California, MAdison 9-1134.

Offense: All counts of the Information (Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19 and 20) charge the defendant with knowingly and wilfully engaging in interstate operations on a public highway, as a common carrier by motor vehicle in the transportation of dangerous explosives for compensation without there being in force with respect to the defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations (49 U.S.C. 306(a)).

Statement of Judgment: Defendant was adjudged guilty on Counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19 and 20 of the Information by the Court on April 17, 1952, and fined the sum of One Hundred Dollars ($100.00) as to each count (or a total of $1300.00).

West Coast Fast Freight, Inc., the above-named appellant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Date: April 24, 1952.

GLANZ & RUSSELL,
/s/ By THEODORE W. RUSSELL,
Appellants' Attorneys.

[Endorsed]: Filed April 25, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal as designated by the attorneys for the Appellant:

Information.

Docket entries.

Minutes of April 17, 1952.

Judgment.

Notice of appeal.

Order for deposit in fine and costs in the registry of the court pending appeal.

Statement of intended points on appeal.

Designation of record on appeal.

Reporter's transcript, April 15, 16, 17, 1952.

Plaintiff's Exhibits 1 to 25.
Defendant's Exhibit "A".

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this twenty-eighth day of May, 1952.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By C. M. TAYLOR,
Deputy Clerk.

In the District Court of the United States for the Northern District of California,
Southern Division

No. 33063

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WEST COAST FAST FREIGHT,
Defendant.

REPORTER'S TRANSCRIPT
Tuesday, April 15, 1952

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Government: C. Elmer Collett, Esq. For the Defendant: Theodore Russell, Esq.
* * * * * [1*]

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

WILLIAM L. HARRISON

called as a witness on behalf of the Government, sworn.

The Court: Q. What is your full name, please?

A. William L. Harrison.

Q. And where do you live, Mr. Harrison?

A. I reside in San Mateo now.

Q. And what is your business or occupation?

A. I am attorney with the Interstate Commerce Commission, Bureau of Motor Carriers.

Q. How long have you been so engaged?

A. I have been with the Interstate Commerce Commission, [6] Bureau of Motor Carriers, since 1939. First as a special agent, and since September of 1951 as attorney.

Q. What is the nature of your work during that period?

A. Most of it was investigation work on complaints against Motor carriers operating on public highways.

Mr. Collett: If the Court please, for the record I would like to have the Clerk mark for identification as Plaintiff's Exhibit No. 1 the certificate of public convenience and necessity.

The Court: It may be admitted and marked.

The Clerk: Government's Exhibit 1 marked for identification.

(Whereupon certificate identified above was marked Government's Exhibit No. 1 for identification only.)

(Testimony of William L. Harrison.)

Mr. Collett: And the application for change or extension of operations as Government's No. 2.

The Clerk: Government's Exhibit 2 marked for identification.

(Whereupon application identification above was marked Government's Exhibit No. 2 for identification only.)

Mr. Russell: You are not——?

Mr. Collett: For identification.

Mr. Russell: I see.

Mr. Collett: And with the exception of the cover page here, which is simply for convenience, the group of documents [7] that is contained in each one of these separate groups, as next in order for identification. This pertains to each one of the 20 counts.

The Court: Let it be admitted and marked for purposes of identification.

The Clerk: Each of these marked as a different number?

Mr. Collett: Yes, as a different number, because they all pertain to different counts.

The Clerk: I will announce the numbers later.

Direct Examination

Mr. Collett: Q. Mr. Harrison, what is your official capacity with the Interstate Commerce Commission?

A. At the present time I am attorney for the Interstate Commerce Commission and have been since September of 1951. Prior to that time for

(Testimony of William L. Harrison.)

approximately 12 years I was special agent engaged in investigation work.

Q. Engaged in investigation work. Now as part of the performance of your official duties, did you personally investigate the matter which is charged in the information pertaining to the violation of the authority in the information that is before this Court at this time? A. Yes, I did.

Q. Are you familiar with the record of the Interstate Commerce Commission at Washington, D. C., as to the applications that have been made by this defendant? [8]

A. Yes, I am familiar with them.

Q. I will show you Government's Exhibit No. 1 for identification and I will ask you what that is, if you will identify it, please?

A. I have examined this document, and it is a certified copy, certified by the Secretary of the Interstate Commerce Commission, and it consists of all of the present operating authority held by West Coast Fast Freight, Inc.

Q. Is that likewise the authority during the period from September the 1st, 1950 to and including May the 6th of 1951? A. Yes.

Mr. Collett: I will ask that it be admitted as Plaintiff's Exhibit No. 1 in evidence.

Mr. Russell: We have no objection.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit No. 1 heretofore marked for identification, now in evidence.

(Whereupon Government's Exhibit No. 1 for identification only was received in evidence.)

(Testimony of William L. Harrison.)

Mr. Collett: Q. I will show you Government's Exhibit for identification No. 2 and ask you to identify that document.

A. I might say that Exhibit No. 1, which consists of the defendant's operating rights, is referred to in Commission [9] language as Docket No. 55905. That is the number that is applied to their operating authority.

This document is numbered Docket No. 55905 sub 34. This is an application for extension of the defendant's operating authority. The sub 34 indicates that they have been—there have been some 33 other changes in the docket prior to this time, which are incorporated in Exhibit 1.

No. 34 is an application filed by the defendant on January the 9th of 1951, wherein the defendant applied for authority to extend its operating authority to include the transportation of explosives and all other dangerous explosives.

Q. Now calling your attention in that document —well, first—strike that.

Mr. Collett: I will ask that be admitted into evidence as Plaintiff's Exhibit No. 2.

Mr. Russell: I wonder if I might have the opportunity of examining it for a moment?

The Court: Certainly.

Mr. Collett: Surely. I am sorry; I thought you had.

Mr. Russell: I had looked at it, I just want to check one thing. Might I have just a moment, Your Honor?

(Conversation between Messrs. Collett and Russell out of hearing of the Reporter.)

(Testimony of William L. Harrison.)

Mr. Collett: There is no question, if the Court please— [10] counsel is calling my attention, I have the entire record of this matter before the Interstate Commerce Commission, which is available to counsel to be utilized in any manner that he sees fit. He calls my attention to the fact that the original application bears the stamp on here of October the 25th, 1950. As to the matters pertaining to the record before the Interstate Commerce Commission, the record is here. I would not—unless it is necessary, because this is the property of the Interstate Commerce Commission at Washington——

The Court: It is available to counsel?

Mr. Russell: Yes, I understand. I thought perhaps we could obviate the objection to the document, if we might have the understanding that the application itself was originally filed October 24, 1950.

The Court: So stipulated?

Mr. Collett: So stipulated.

The Court: Let the record so show.

Mr. Collett: That whatever——

Mr. Russell: That because of certain terminology used therein, a request for clarification was made by the Commission upon the applicant, that that clarification, I should say that pending the receipt of that, an order was entered by the Commission dismissing because of a lack of clarity, which, when it was cleared up, January 9th, 1951, reinstated the application. [11]

(Testimony of William L. Harrison.)

Mr. Collett: That the order of dismissal is on the 21st day of December, 1950?

The Court: And it was reinstated when?

Mr. Russell: It was accepted without a formal order of reinstatement, but upon the filing of an informal letter of amendment on January 9, 1951, I believe is the date.

The Court: So stipulated?

Mr. Collett: So stipulated.

The Court: Let the record so show.

Mr. Russell: And I would like to ask that it be further stipulated that a petition for reconsideration of the decision of the Commission has been filed by the applicant, I believe on February 22nd.

Mr. Collett: February the 25th.

Mr. Russell: 1952.

Mr. Collett: '52.

Mr. Russell: And that that motion or petition is pending and undetermined at the time of this hearing.

Mr. Collett: So stipulated.

The Court: Let the record so show.

Mr. Russell: With that exception, I have no objection to that document.

The Court: Let it be admitted and marked next in order.

The Clerk: Government's Exhibit 2, heretofore marked for identification, now in evidence. [12]

(Whereupon Government's Exhibit No. 2 for identification only was received in evidence.)

(Testimony of William L. Harrison.)

The Court: Is there any correction in that statement you wish to make?

The Witness: No, that is correct, Your Honor.

The Court: All right.

Mr. Collett: At this time, if the Court please, I will also read into the record the document clarifying the application, which counsel for the defendant has just referred to, which bears the date of January the 4th, 1951, over the stationery of William B. Adams, Pacific Building, Portland 4, Oregon, and addressed to Mr. W. Y. Blanding, director, Interstate Commerce Commission, Bureau of Motor Cariers, Washington 25, D. C.

"Re Docket MC 55905 sub 34, West Coast Fast Freight, Inc.

"Dear Sir: Confirming telephone conversation it is requested that the above application be amended to read as follows:

" 'Explosives of all types, including dangerous explosives in connection with presently authorized routes and territories in the states of California, Oregon, Washington, Idaho and Montana.'

"The purpose of the application is to add explosives as a commodity wherever explosives as [13] a commodity is not specified or included in descriptions of presently authorized operating authority. No duplication of authority is requested, nor is any broadening of points of service or of territories of service requested, except as to the addition of the commodity explosives.

"I certify that I have this date served a copy

(Testimony of William L. Harrison.)

of this letter upon all known existing carriers, including carriers listed in the application, and upon the regulatory bodies of the several states involved.

"Very truly yours,

"William B. Adams."

Counsel, for the record, William B. Adams is an attorney representing the defendant in this action before the Interstate Commerce Commission?

Mr. Russell: That is correct; we so stipulate.

The Court: Let the record so show.

The Clerk: Government's Exhibits 3 through 22, inclusive marked for identification.

(Whereupon documents referred to on page 8, above, were marked Government's Exhibits 3 through 22 for identification only.) [14]

* * * * *

Mr. Collett: Q. Mr. Harrison, calling your attention to the portion that I just read, I will ask you to read that, and what is the significance of the "without restriction" in that provision?

Mr. Russell: To which I am going to object on the grounds that it calls for a conclusion of the witness without any proper foundation being laid to show that the witness is qualified to give us an expert opinion as to the meaning of the term used in the language of the certificate.

The Court: The objection will be sustained; you will have to lay your foundation first.

Mr. Collett: Q. Mr. Harrison, you first went into the service with the Interstate Commerce Commission when? A. In January of 1940.

(Testimony of William L. Harrison.)

Q And what was the nature of your duties at that time?

A. I was employed as a special agent.

Q. To investigate what?

A. Investigating complaints and violations of the Motor Carrier Act, as it was known at that time, before the Transportation Act of 1940 was changed. It is known as Part 2 of the Interstate Commerce Act now, pertaining only to motor carrier operations.

Q. And how long did you continue in that work?

A. Until September of 1951, with the exception of a couple of years I was in the service.

Q. And during the course of that time, did your work call for you to be familiar with all of the provisions of the Interstate Commerce Act?

A. Generally so, yes.

Q. And pertaining to the action of the Commission in the provision or prescription of various authorities determining the operating authority of various companies and application made therefor?

A. That's correct.

Q. Since 1950, when you terminated your activity as an investigator, what has been your employment?

A. I have been serving as attorney for the Bureau of Motor Carriers.

Q. And what has been the extent of your duties as an attorney?

A. It is the review of investigation reports and the preparation of reports to the Commission with

(Testimony of William L. Harrison.)

respect to proposed prosecutions and settlement of matters of a legal nature.

Q. And has that included the examination of all investigative reports pertaining to all types of violations pertaining to the motor carriers?

A. That's correct.

Q. And your work has been exclusively as to motor carriers, [20] has it, during this period?

A. That is correct.

Mr. Collett: Well, I will renew the question at this time.

Mr. Collett: Q. Calling your attention to Sheet No. 5, the portion which I last read, and which I will again call to your attention, at the top of the page, services authorized to and from all intermediate points north of Sacramento, on the above-described highways between Los Angeles, California, and Portland, Oregon; between Davis Junction, California, and Red Bluff, California; and between Junction City, Oregon, and Portland, Oregon, without restriction—what is the meaning of the provision therein, "without restrictions"?

Mr. Russell: To which I would still like, if the Court please, to interpose the objection that there has been no proper foundation laid, and in view of the statements, I would like to specify more particularly what I have in my mind, that there is nothing shown in the foundation laid with respect to the experience of this witness to show that he has ever participated in the portion of the Commission's functions and which the designation and

(Testimony of William L. Harrison.)

use of terms in certificates, of which that is a part, and that there is no showing that he has ever been called upon to act in a semi-judicial capacity on behalf of the Commission, where he has been called upon, or under his duties has formally interpreted [21] what the meaning of the certificate is.

The Court: You may ask him whether or not he has.

Mr. Collett: Q. You have heard the objection of counsel. Have you had the experience that has been indicated by that objection?

A. Well, necessarily in the conduct of my duties I have been required to read, review and analyze certificates. That is one of the first things that we must do in order to know where we stand before we can start an investigation, and I have read and studied many of them, together with many decisions of the Commission in the interpretation of certificates. Naturally during that period of time I feel that I have a reasonably legal understanding of what the certificate means and what the Commission intended that it should mean. I have not sat as an examiner, however, in any administrative proceeding. That is a separate and entirely different function from the one which I have performed.

The Court: Is there any other person in your organization who could meet this test that is confronting the Court now?

The Witness: Well, we do have examiners within——

The Court: Are they more familiar?

(Testimony of William L. Harrison.)

The Witness: Not necessarily. I would say from the standpoint of interpretation of a certificate, that is.

The Court: My own thought goes to the weight of the testimony. [22]

Mr. Russell: Well, I had posed the matter, Your Honor, because in this type of proceeding it is my understanding that there is a section known as the section of certificates, whose primary function is to describe these documents, and also that the matter of formal interpretation of the meaning of language is delegated to others, who are brought under the provisions of the Administrative Procedure Act. where they deal after formal proceeding and discussion and so forth, with respect to interpretations. It strikes me that—I won't urge my objection further, but submit the objection, that that is the only type of person who should be able to advise us what a certificate means.

The Court: Under the circumstances here, I shall say that under the rule, it will go to the weight of the testimony. That won't preclude you from presenting testimony to rebut any testimony that this witness may give. All right, let the record so show. The objection will be overruled.

The Witness: May I see this?

Mr. Collett: Q. Yes. (Handing to witness.)

Mr. Russell: If the Court please, I want it clearly understood I am not trying to further argue the ruling with respect to this matter, but in one sense, the testimony which the witness is purporting

(Testimony of William L. Harrison.)

now to give also relates to this matter which I indicated goes to the basic defense. I would prefer to pose that phase of the objection, if that is [23] what it is, when it is pointed to the direct matter in issue, rather than to this point; just so that it won't be understood that I had waived or stepped back, and that the matter is still open.

The Court: Let the record disclose there is a running objection to this line of testimony. Counsel has just indicated that.

Mr. Collett: I understand the objection of counsel, if the Court please, as going to be specifically related to the term "dangerous explosives."

The Court: Yes.

Mr. Collett: Yes. Well that matter we will meet when it arises.

The Caurt: And your objection is noted. I will allow the testimony to go in subject to your motion to strike.

Mr. Russell: Very well, with that understanding.

The Witness: (Answer) This particular provision which you have reference to now pertains to the service to intermediate points on the route between Los Angeles, California, and Portland, Oregon. The wordage of the certificate shows that there is some restriction to the service of intermediate points on northbound traffic and some on southbound traffic, and within certain designated areas within that route there are not restrictions, that they can handle traffic both ways. The primary restric-

(Testimony of William L. Harrison.)

tion on the commodity, however, retains [24] its identity in the reciting part of the authority, where it says, "general commodities, except those of unusual value and except dangerous explosives." Those are restricted in any event.

The Court: We will take a recess.

(Recess.)

The Clerk: Government Exhibits 23 and 24 marked for identification.

(Whereupon documents above referred to were marked Government Exhibits Nos. 23 and 24 for identification only.)

Mr. Collett: If the Court please, to assist the Court in visualizing the routes, I have obtained from the defendant a portion of the western territory of the United States which is marked on the red lines the areas, the highways over which they operate, and I will ask that be introduced in evidence.

Mr. Russell: No objection.

The Court: Admitted, and marked.

The Clerk: Government Exhibit 25 admitted and filed in evidence.

Mr. Collett: Also the following stipulation, if the Court please, that the term "except dangerous explosives" which we have referred to now several times that is contained in the operating authority, that the term "except dangerous explosives" is contained in that portion of the certificates which de-

(Testimony of William L. Harrison.)

scribes the operating authority from Oakland, [25] California, to Tacoma, Washington.

(Whereupon the western territory statement referred to above was received in evidence and marked Government's Exhibit No. 25.)

Mr. Russell: We are willing to so stipulate.

The Court: The record will so show.

Mr. Collett: I will read it again, if there is any doubt. That the term "except dangerous explosives" is contained in that portion of the certificate which describes the operating authority from Oakland, California, to Tacoma, Washington.

The Court: What does that spell out?

Mr. Collett: If the Court please, we are endeavoring to present to the Court that any transport over the area from Oakland, California, to Tacoma, Washington, as related to the "except dangerous explosives," if that is a restriction, that it applies to any shipment which went over those routes.

Mr. Russell: Perhaps we are saying the same thing. It is our understanding of this that these portions of exhibit 1 which undertakes to describe the operating authority authorizing the defendant to traverse the highways between Oakland and Tacoma contained in it the words "except dangerous explosives."

The Court: "Except dangerous explosives"—very well.

Mr. Collett: Q. Mr. Harrison, did you personally examine the records and books of the defend-

(Testimony of William L. Harrison.)

ant as pertaining [26] to the operations which were involved in the information? A. I did.

Q. Which is now before this Court?

A. I did.

Q. I show you Government Exhibit 3 for identification, which contains three separate documents (handing to witness). Would you identify those documents?

The Court: What are they?

A. These documents are what is known in the industry as freight bills.

According to the regulations, every carrier must execute a receipt or freight bill or some instrument which indicates the transportation being performed.

It must show the point of origin and the shipper, the point of destination and the consignee, the date, a description of the commodity transported, the rate, and the transportation charges.

That is substantially what each carrier must issue.

This particular exhibit is a freight bill, which happens to be a delivery copy of a freight bill. The carrier makes several copies of these bills for their own convenience but they use one copy generally for the consignee's signature as proof of delivery.

The Court: No objection to the copy?

Mr. Russell: No, so far as the fact that it is a copy. [27] I do have an objection to the document.

A. This document was examined by me in the office of West Coast Fast Freight in Seattle, Wash-

(Testimony of William L. Harrison.)

ington, which is their domicile, and it was photostated by employees of West Coast at my request.

This particular document shows the transportation of——

Mr. Russell: Just a moment. I would like to interpose an objection and say that this proposed testimony is not responsive in that the document would be the best evidenec as to what it does reflect, and ask that the witness should not read from it prior to the time, since I have an objection to the document itself. A. This freight bill——

The Court: He may read the freight bill. No objection to that, is there?

Mr. Russell: Well, yes. That is what I have objection to. I have an objection to the admissibility of the document on the issues of the case, which I propose to interpose when the document is formally offered.

Mr. Collett: Well, if the Court please, in order to facilitate the objection, at this time we will identify the other two documents, I will offer them into evidence, and he can make his objection.

The Court: Very well.

Mr. Collett: Q. Would you identify the other two [28] documents attached thereto?

A. Well, this particular movement from origin to destination was beyond the operating authority of the defendant, which is a point in issue. It was turned over to a beyond carrier and delivered.

The Court: Same shipment?

A. The same shipment.

(Testimony of William L. Harrison.)

Mr. Russell: I would like to make a motion to strike, if the Court please, the statement of the witness as nonresponsive to the question and it is immaterial to the proceedings, and no foundation laid that he knows it was transported beyond. I think it is immaterial.

The Court: Do you know yourself, or only from those documents?

A. From the document and from my interview with Mr. Gottstein, who is the Government bill of lading clerk for the defendant, and he verified that this shipment went beyond, and I personally did check that matter because I wanted to clarify whether this beyond carrier had authority to transport dangerous explosives.

Mr. Collett: Q. And the third document.

A. That is a correction——

The Court: Let the record show the objection will be overruled. I will allow this subject to your motion to strike.

A. This is a correction bill. The freight charges originally [29] as contained on the face of the bill were not correct, and a correction bill was issued. These three documents were attached together and were furnished me by the defendant attached as they are here.

Mr. Collett: Q. And are those photostatic copies? A. Yes, they are.

Q. They were made by you or at your request from the original documents which you obtained from the files of the defendant, is that correct?

(Testimony of William L. Harrison.)

A. They were made by an employee of the West Coast at my request.

Mr. Collett: I offer them into evidence, if the Court please.

Mr. Russell: If the Court please, I have an objection to the admissibility of the documents, and I am prepared to argue the matter with reference to certain cases. I feel it is quite material to the case and I would like to be heard on them if I may.

I would like to state first to the Court that we have here in a sense a rather peculiar position. The matter has not been developed, and my objection in part goes to the failure of the foundation, not in the sense of the validity of the copy but on a more basic matter.

We have a rather peculiar situation, in that the merchandise being transported by the defendant, as I think it [30] will appear in all or substantially all of the counts of the complaint, moved under seal of the United States Government and that access to the lading was not available to the defendant at the time it moved the freight or at the time that it prepared the documents of which Exhibit 3 are a specimen.

The Court: "Under seal"—I don't follow that.

Mr. Russell: The physical vehicle when it moves from a Government installation is sealed with a metal seal which cannot be removed without destroying the seal, and when it moves for the United States Government, as these did, the Government seals it at point of origin with Government employ-

(Testimony of William L. Harrison.)

ees and when it arrives at its destination they must be the ones to break the seal. So that while the property is in the custody of the defendant, it has no way of knowing nor can it know what the commodity is that is inside of the vehicle, which is its vehicle.

I would like to call the Court's attention to the case of Reinke vs. The United States in the Circuit Court of Appeals of the Missouri Area in 278 Fed at page 724, wherein the defendant was charged in a prosecution of larceny from a railroad box car of certain automobile tires, in interstate commerce. The Government undertook to do much as the Government has done here, to call a representative of the railroad company—in that instance to identify the shipping documents [31] prepared by it, by the railway, for the transportation of the merchandise. The documents were offered by a witness other than the witness or the person who actually prepared these documents. Over the objection of the defendant they were admitted in the trial court. They included the bill of lading and certain other freight bill documents. The Court held on appeal that there was no proper foundation laid for receiving those papers in evidence, that they were clearly hearsay on the issue of what the contents of the vehicle were and on the issue of the fact of its interstate transportation—but more particularly on the issue of the contents of the vehicle itself.

I would like to also call to the attention of the Court the case of Ellis vs. The United States in the

(Testimony of William L. Harrison.)

Eighth Circuit Court of Appeals, appearing in 57 Fed 2nd at 502, a 1932 case, in which the defendant was charged with unlawfully breaking the seal of a railroad car and entering it with intent to commit larceny. In that instance the Government went further than has been done as the foundation for these documents by calling specific persons who could testify to the various factors or facts with respect to loading and so forth, and they offered a waybill, which is the railroad document, as the Court may be familiar, which the railroad prepares to act as the control document on the movement of the car through the course of the rail lines movement. [32]

The waybill was received by the trial court without restriction as to its purpose. In the Circuit Court of Appeal the ultimate conviction was affirmed basically upon the ground that the specific direct evidence had been presented as to the movement of the goods into the car and as to the movement along the line and indicated that the waybill might have some probative value in the proceeding simply as an explanation of handling by the rail line. But with respect to its admission as to proving the fact of contents, the Court said:

> "As to admission of the waybill, it may be said that if it were necessary to prove the cigarettes came from Winston-Salem to Fort Smith"—

I might there interpolate by saying that there were

(Testimony of William L. Harrison.)
three points at which the location of the goods were fixed, Winston-Salem, Fort Smith and the ultimate destination of Fort Gibson, Oklahoma. This waybill dealth with the movement from Winston-Salem to Fort Smith, the intermediate point.

> "—it may be said that if it were necessary to prove the cigarettes came from Winston-Salem to Fort Smith, it may be doubted whether the waybill by itself was competent evidence of the fact or whether there was sufficient proof in the record of that fact, that point having been directly raised in the trial court—" [33] citing

the Reinke case, or however it may be pronounced, that I have just referred to.

Continuing, the Court said,

> "It may be said that there was a failure of proof in that the indictment alleged that the Interstate shipment was from Winston-Salem to Fort Gibson, Oklahoma, but no competent evidence showing the shipment to have originated at the point alleged."

Then they held that the failure to prove the movement between Winston-Salem and Fort Smith was immaterial because they had proved by direct testimony from Fort Smith on to Fort Gibson, which was itself an interstate movement, and that the goods were present in the car at Fort Smith, so that the actual breaking took place some place beyond that point. But I think the case is significant and does support the objection which we make here,

(Testimony of William L. Harrison.)

that the documents are hearsay and that they are not the best evidence of the fact with respect to the character of the transportation.

In making that objection I am fully conscious of the fact that in this instance, as distinguished from the two cases which I have cited, the document purports to be a document of the defendant itself, and that is why I opened my comment with the statement that we have a peculiar situation, to wit: That we are compelled to describe something in a shipping document, the exact knowledge of the contents of [34] which we do not have, and I think under those circumstances there is the further ground of no proper foundation laid to bring home to the defendant the fact of knowledge which would constitute this admission by the defendant of the fact of the contents of the trucks, and so I would like to interpose my objection on the ground that it is hearsay, the ground that no proper foundation has been laid, in that there has been no showing of the contents of the vehicle by a separate and independent evidence, and upon the further ground that there has been no proper foundation laid to show any necessary knowledge, or the necessary knowledge to this defendant that the contents of the box were as they may be described in the freight bill.

Mr. Collett: Well, if the Court please, the matter which is presented here seems to me to be the ultimate fact which the defendant by its own act has described the contents, the matter which they

(Testimony of William L. Harrison.)

purported to ship, giving all the data and information pertaining to the shipment, and bears the receipt of having been paid for that particular shipment.

The matter that counsel refers to, as to what the actual contents of the particular sealed truck may have been, I don't think is material as far as this particular, in that——

The Court: Knowledge is important.

Mr. Collett: Well, they have themselves described the goods that they shipped. [35]

The Court: Read the document.

Mr. Collett: It says 60 boxes of percussion caps, 270 boxes detonating fuses, 330 explosive placard applied.

The Court: Does that bring knowledge home to the defendant?

Mr. Russell: It is the contention, if the Court please, that it does not, because the information, as a matter of fact, which is contained upon this document, is in turn secured from other documents and cannot be secured from the contents of the vehicle itself.

I might point out that my objection is, I believe, more than a technical one to the evidence, because of my practical experience with carriers handling government freight in the last war. I knew it to be a fact that at times after the war is over the general accounting office seeks to recover charges from the defendant on the ground that what was described in their freight bill was not the goods

(Testimony of William L. Harrison.)

which moved when it moved under seal, and then say to the carrier: You must now pay us back a part of the freight charges which we paid you because we did not ship in that truck what your freight bill shows we did ship.

And I say, I recognize we have an unusual situation, that the words which are used on this freight bill are nothing more or less than a copy of words taken from a bill of lading which in turn was prepared by someone else, and that because [36] the vehicles were sealed we had no power to check, and that this was simply a document so far as it applies to a sealed truck movement, is simply a written memorandum to implement the onward movement of that vehicle, whatever its contents may be, and does not serve the purpose of a freight bill in the ordinary case where the carrier will have the goods tendered, with the goods in his possession, and subject to observation, and then cuts a document to say this is what it is.

Mr. Collett: Well, if the Court please, the ultimate fact which counsel discloses is that the company has charged itself in issuing this bill with the contents and knowledge of what they were transporting, in which they state they have taken under transport 60 boxes of percussion caps and 270 boxes of detonating fuses.

Now, they have even received payment for the transportation of those goods. That is the ultimate fact. The origination, the manner, the course over which the goods were shipped are disclosed.

(Testimony of William L. Harrison.)

They in the face of what is stated upon their own bill which they issued at the time they took possession, they have proceeded to transport this shipment, in the face of what their operating authority may actually be, which brings us again to the question of "except dangerous explosives" and will ultimately pose the question for this Court as to [37] whether or not the 60 boxes of percussion caps and the 270 boxes of detonating fuses are within "Explosive A" and "Explosive B" in accordance with the Tariff and the Regulations, but the ultimate fact is that they accepted the shipment, they issued their own bill, they described the contents, and proceeded to ship over the route, that they did ship it. It seems to me that is absolutely the ultimate fact before this Court.

Mr. Russell: If the Court please, I think perhaps I can answer counsel's argument by asking a question. Assuming, as I believe to be the fact, that the vehicle itself was closed, and the defendant had no opportunity to see it at all, how can any statement of the defendant be taken as proof of what there was in the box? That is the basis, the primary basis of my objection, that that is hearsay testimony to establish the contents of the vehicle, and where that evidence alone is all that is offered, I submit the authority which I have cited from the Reinke case, which is the only one I can find where we are posed with actually this issue—this document and this document alone is offered to prove what was in the vehicle—that we are accepting hearsay testi-

(Testimony of William L. Harrison.)

mony and in effect not hearsay but a presumption or a guess of the defendant's as to what might be in that vehicle. It didn't even know what was in the vehicle.

The Court: Submitted? [38]

Mr. Collett: Submitted.

The Court: Since the Jury is absent, I will overrule your objection, and I will allow it go in subject to your motion to strike so that you don't lose any of your legal rights.

Mr. Russell: Very well, sir.

Mr. Collett: For the Court's knowledge, the 20 counts that are charged in the information are founded upon similar bills, the source of information. What counsel says with regard to what actually may have been in those wagons, that there was anything other than was indicated by the bill they charged, it seems to me if there is any proof before this Court it would be a matter of defense. That the prima facie case that we have made is to show by their own billing that they have taken under their authority to transport certain goods, and the question then is whether or not they have the authority. In the face of their own statement as to what the contents were, they had proceeded to ship it.

Mr. Collett: What is before the Court now?

Mr. Collett: Before the Court is the entire 20 counts, which will be founded upon similar documents.

The Court: You will have to enter into a stipulation in order to get a proper record.

(Testimony of William L. Harrison.)

Mr. Russell: We might—I think I might be willing, in the interest of saving time, to stipulate that if questions [39] were asked as to the shipping documents related in Exhibits 4 through—or 3 to 22, counsel?

Mr. Collett: Through 22, yes.

Mr. Russell: Respectively, that it might be stipulated that the witness would be asked the same questions and give substantially the same answers, with due regard to the difference in the contents of the specific documents in question.

The Court: Interrogate the witness then.

Mr. Collett: Q. Mr. Harrison, calling your attention to Government's Exhibits for identification 3 through 22, which pertain to each of the counts numbered 1 through 20, calling your attention to the questions which you have been asked pertaining to the Government's Exhibit 3, the first count, and the documents contained therein, if you were asked similar questions as to the entire group of documents under each one of the Exhibits for identification 3 through 22, would your answers be the same?

A. They would be substantially the same. Most of the shipments did not have a beyond movement, but the answers are substantially the same.

Mr. Collett: Now it is understood that your objection runs to each and every one of the counts?

Mr. Russell: In order that the record may be clear, may the record show my objection on the

(Testimony of William L. Harrison.)

ground of hearsay, and [40] no proper foundation laid.

The Court: Let the record so show.

Mr. Collett: Q. Mr. Harrison, calling your attention to Government's Exhibit 4——

Mr. Collett: Then subject to the objection, if the Court please, I will ask that the Government's Exhibits for identification Nos. 3 through 22 be admitted into evidence.

Mr. Russell: May it be understood that they are received subject to our right to make a motion to strike?

The Court: Let the record so show. They may be introduced and marked. They are going in subject to a motion to strike, over the objection of counsel.

The Clerk: Government's Exhibits 3 through 22 introduced in evidence.

(Whereupon Government's Exhibits 3 through 22 for identification only were received in evidence.)

Mr. Collett: Q. Now calling your attention to Government's Exhibit 4, I show you a document which says, "U. S. Government bill of lading, original." Would you identify that document?

A. This is a document which was attached to the delivery receipt on freight bill No. 820934, which delivery receipt was furnished to me in the defendant's office. The document which you refer to is a Government bill of lading and it shows on the face

(Testimony of William L. Harrison.)

thereof the particular commodity which was [41] being transported, the origin of the shipment, the destination of the shipment and the participating carriers.

Q. Now calling your attention to the first document, issued by the defendant, which bears the number 820934 and describes the contents of a particular shipment, are the contents of the shipment indicated therein the same as those indicated in the government bill of lading?

A. It is in the exact verbiage.

The Court: Read it into the record.

The Witness: On the government bill of lading it says, "Description of commodities: 45 pallets (abbreviation pal, p-a-l) of explosive projectile, explosive projectile for cannon."

On the freight bill it says, "45 pallets explosive projectile, explosive projective for cannon."

Mr. Collett: Q. And where was the origination of the shipment as disclosed by the documents?

A. The shipment originated in the Army Ordinance Depot at Herlong, California.

Q. And where from Exhibit 4, is it indicated that the defendant took custody or possession of that shipment for transportation beyond?

A. I can tell from the explanation given by the defendant, the freight bill number is the billing station at Oakland. The freight bill was made at Oakland. The shipment originated [42] at Herlong, California, and was transported by Wells Cargo from Herlong to Oakland.

(Testimony of William L. Harrison.)

The Court: Where is Herlong?

The Witness: It is about 40 miles northwest, right over the California boundary from Reno, Nevada.

The Court: Oh, yes.

A. (continuing) And from Oakland, California —at Oakland it was turned over to the defendant and the defendant transported the shipment to destination.

Mr. Collett: Q. Where was the destination?

A. The destination here was at the army firing center in Pomona, Washington, which is about 13 miles north of Yakima, Washington.

Q. Is there any receipt of payment indicated on the document?

A. This is the delivery receipt, and this bill does not indicate, does not show "Paid" on the face of it, but I verified the payment of each of these movements with Mr. Gottstein at the time I conducted the investigation.

Q. And in each case they had been paid? [43]

A. Yes. * * * * *

Mr. Collett: Q. From the document that you have, Mr. Harrison, can you tell us the point of origin and the route the point at which the defendant took possession and custody for the further shipment of the commodities or goods that are indicated?

A. Well, the point of origin is Herlong, California, and from the document it is indicated that the defendant took possession at Oakland. It is an Oakland billing.

(Testimony of William L. Harrison.)

It was transported from Oakland by the defendant to the Seattle Port of Embarkation. This happens to be that one particular shipment which was turned over to a beyond carrier for final delivery.

Mr. Russell: If the Court please, I would again, in order that we may keep the last——

Mr. Collett: The last portion of the answer may go out.

The Court: The last portion of it may go out.

Mr. Russell: And that is at what point?

The Court: The last portion of it is——?

Mr. Collett: The trans-shipment.

The Court: The trans-shipment. [45]

Mr. Russell: Well, my objection went more deeply than that. I submit that the document is the best evidence as to whether or not he can show how it moved and where it moved, and I doubt very seriously that the witness can from the document tell us anything except that it shows a point of origin and a point of destination, and that's all.

The Court: Q. Is that right?

A. From that particular bill there is no indication on that bill——

Q. You have no other knowledge than that bill, have you?

A. Well, I do from the explanation of the employee, Mr. Gottstein, of the West Coast.

Q. I see.

The Court: Well, you will have to establish that.

Mr. Collett: Q. Well, from this bill, Mr. Harrison, what information do you derive as to the origin

(Testimony of William L. Harrison.)

and the shipment of the commodities indicated therein by the defendant?

A. Well, my answer would be practically the same, because I know from the billing that his is billed at Oakland, and that that is the point where the defendant took possession of the commodity.

The Court: Q. And kept possession up to what point?

A. That is where it was turned over to the defendants.

The Court: I understand.

The Witness: And that he transported it to Seattle, Washington. [46]

The Court: All right.

Mr. Russell: I don't wish to be contentious, if Your Honor please, but I submit that there still has been no foundation laid to show this witness has any information to show the fact of that. He is relying simply on the document, which says, "origin point, Oakland; destination point, Seattle", or X. And that that is all that he can say from this document.

The Court: That is as far as you are going into?

Mr. Collett: That is what I am endeavoring to establish, what the document itself says as to the point of the origination of the shipment and the destination from that document.

The Court: Your objection will be noted and it will be overruled. It is going in subject to the same motion.

Mr. Russell: Very well. Thank you, sir.

(Testimony of William L. Harrison.)

Mr. Collett: Q. Did you have any discussion with any employee of the defendant pertaining to that particular shipment?

A. This particular ship?

Q. Yes.

A. Yes, I discussed each of these.

Q. With whom?

A. With Mr. Gottstein, who was referred to me by Mr. Zweben, who is the secretary-treasurer, I believe. I contacted him first and he turned me over to Mr. Gottstein and directed [47] that Mr. Gottstein aid and assist me in this investigation, and he is the gentleman with whom I talked and discussed these particular shipments with. I had other discussions with other members of the defendant corporation.

The Court: Fix the time as near as you can.

Mr. Collett: Q. Yes.

A. I conducted two investigations in this matter, and the first one was conducted, I believe, in the week of March the 15th, 1951, and the second time I called was right around May the 1st, 1951.

The Court: All right, proceed.

Mr. Collett: Q. And what information did you derive from your discussion pertaining to this particular shipment which is not contained in the certificate, the documents that you have, as Government's Exhibit No. 3?

Mr. Russell: To which I am going to interpose an objection; the question is indefinite and uncertain. He is referring to investigations generally on

(Testimony of William L. Harrison.)

two different occasions. He started out referring to a particular conversation on a particular matter and a particular man.

The Court: He limited it to these documents here, I think.

Mr. Collett: I did.

Mr. Russell: Is that your question, sir?

Mr. Collett: Yes. [48]

A. Well, I examined all shipments of what I considered dangerous explosives, coming from this point of origin, and I discussed all of those shipments. The way in which they were billed,——

The Court: Q. Well, now, you say you discussed them. That is a conclusion; state the conversation as near as you can remember it.

A. Well, I discussed them with Mr. Gottstein, and I asked him if this was another shipment coming from Herlong, and he said yes. Was this another shipment from which Wells Cargo performed the prior movement? And, yes. And I also asked if this is the Oakland billing, if it was where the defendant took possession of the commodity, and the answer was yes. And if the defendant transported it to Seattle.

Q. Transported what?

A. The shipment that shows, the percussion caps and the detonating fuses.

Q. Does he have knowledge of those?

A. Mr. Gottstein?

Q. Yes. A. Only on the face of the billing.

The Court: Proceed.

(Testimony of William L. Harrison.)

A. (continuing) And he replied yes. And I also interrogated him about the beyond movement by the Harbor Oak—or the Oak Harbor Freight Lines and he verified that it moved beyond. [49] I asked him concerning this third copy here and he explained to me that there had been a mis-billing on the original freight bill and that this was the correction copy of the freight bill.

Mr. Collett: Q. Did he make any statment to you that the contents, description of the goods as contained on that bill, were not shipped?

A. No.

Q. What was the date of that shipment?

A. This shipment was September the 7th, 1950.

Q. September the 7th? A. Yes.

Q. On the information, it is charged in Count 1 that on or about the 9th day of September, 1950, that the defendant did, etcetera, ship—it charges particularly two hundred and seventy boxes of detonating fuses, the contents described here—270 boxes of detonating fuses, and gives as the date of the shipment, September the 7th or September the 9th?

Mr. Russell: To which I am going to object on the ground that there has been no proper foundation laid to show that this witness has knowledge of the fact of the date of the shipment. All he has done is to examine certain documents.

The Court: Q. State whether or not you have any knowledge in this regard. [50]

(Testimony of William L. Harrison.)

A. Yes, I do. I examined additional documents to vertify the date of shipment.

Q. What documents?

A. The defendant keeps what is known as a trip report, which is a report compiled by each driver on a vehicle during the course of the movement, and that trip report is filed with the defendant and the trip report shows the starting time, it shows what is known in the industry as division points, where they change drivers, and that most of these trip reports showed the arrival time at the Seattle or Tacoma depot.

Mr. Collett: Q. What was the date of shipment as indicated from those reports?

Mr. Russell: To which I am again objecting on the grounds that the witness has, that there has been no proper foundation on laid to show that the witness of his own knowledge had any independent knowledge as to the fact of the date of the shipment. He is relying here on other documents which he is not producing.

The Court: Q. Do you know of your own knowledge the date?

A. I know from the documents in the carriers' records the date that this particular vehicle left Oakland.

The Court: I will allow the testimony to stand, subject to your same motion.

A. (continuing) This vehicle left Oakland—if I may [51] refresh my memory here with this (consulting paper)?

(Testimony of William L. Harrison.)

The Court: Q. What have you there?

A. I made a compilation of the information on the trip reports; each trip report refers to a vehicle number and that is the method in which I could connect up the particular trip report with the particular shipment.

Q. You yourself did that?

A. I did that from the carrier's records, sir.

Q. Indicate in what way you did it.

A. Each manifest—the carrier keeps a manifest and on that manifest there is a description of the commodity, there is also a record of the vehicle number. Each vehicle is numbered, each tractor has a number and each semi-trailer has a number. In connecting up those numbers, I would take those numbers and I would go to the trip report. There is a gentleman by the name of Mr. Castellano, I believe, who is in charge of trip reports. That is his job. I would give him the number of the vehicle and he would go to the trip report records and pull the trip report representing that particular movement.

Q. Where was this?

A. In the Seattle office of the defendant.

Q. When?

A. I did that on both occasions, in March and in May.

The Court: We will take a recess until 2 o'clock.

(Whereupon an adjournment was taken until 2 o'clock p.m. this day.) [52]

Afternoon Session, Tuesday, April 15, 1952
at 2 o'clock p.m.

WILLIAM L. HARRISON

recalled as a witness on behalf of the Government, previously sworn:

Direct Examination—(resumed)

Mr. Collett: Q. Mr. Harrison, calling your attention again to Government exhibit number 4, would you tell us the date of that shipment?

A. That shipment left Oakland on October 16th.

Q. On October the 16th? A. Yes.

Q. And does it show the shipment of forty-five pallets explosive projectiles for cannons?

A. Yes, sir.

Q. And that is by a motor vehicle of the West Coast, the defendant herein. What is the amount that is indicated that was charged for the transportation?

Mr. Russell: Just a moment. I am going to object to that as being a compound question. It relates to the motor vehicle of the defendants and the virtue of the charges. I have no objection to the witness reciting the statement as shown on the document as to the charge shown, subject to my general objection. The document itself is the best evidence of what it says on its face. But Counsel has injected——

Mr. Collett: I will withdraw the question, if the Court please. I just want to bring out the amount that was indicated from the document, for the record, as was the charge that was made for the transportation of the particular goods indicated on that document.

(Testimony of William L. Harrison.)

The Court: You may answer.

A. The total charge amounted to $1121.22.

Q. Doe sthe document disclose whether or not it was paid?

A. The document—this document does not disclose that it was paid.

Q. Did you have any conversation with any representative of the defendant in which you were told that was paid? A. Yes.

Q. And that shipment was from what two points by this defendant?

Mr. Russell: To which I am going to object on the grounds there is no proper foundation laid to show that this witness has independent knowledge of that fact. Counsel has heretofore framed his questions as to referring the witness to state what the document purports to reflect in that effect, and I believe that the foundation has not been laid to show that this man has independent knowledge of that document—independent from that document.

Mr. Collett: Q. As disclosed by that document and [54] your conversations with the representatives of the defendant during the course of your investigation.

The Court: What representative?

Mr. Collett: He previously testified——

Q. Who were the individuals or the representative of the defendant with whom you discussed the matter of these documents and these shipments?

A. Well, the particular individuals with whom I discussed the shipments——

(Testimony of William L. Harrison.)

The Court: The shipments now you are speaking about?

A. This particular shipment.

The Court: Yes?

A. ——was Dick Gottstein. Gottstein is his last name. I think it was Dick.

The Court: An employee?

A. An employee of the defendant in charge of the Government bill of lading department.

Mr. Collett: Q. And what were the two points, the point of origin, as far as the defendant is concerned, that they took into custody the shipment?

Mr. Russell: To which I am going to object again on the ground the foundation has not been laid, on the basis that it has not been established that Mr. Gottstein is the man who has such information.

The Court: If you know, answer. [55]

A. I know what he told me.

The Court: Who told you?

A. Mr. Gottstein told me, and that these particular numbers referred to the billing station, which is of—which this bill carries, is Oakland, and that is the point where the defendant took possession of the commodity.

Mr. Collett: Q. And it was shipped to where?

A. To Pomona, Washington, which is near Yakima, Washington.

Mr. Russell: Counsel, might I suggest, would it facilitate and avoid the objection and the necessity of interrogation and my objection here, if I

(Testimony of William L. Harrison.)

would stipulate that where the figure 9 appears as the first figure on these documents that it designates the code number for the billing station of Oakland, California of the defendant company? If you are attempting to establish, as far as the document is concerned, I would be willing to stipulate that the code number 9 appearing as the first number in the upper right hand corner separated from the remainder of the numbers by a dash is the code number system adopted by the defendant to indicate that Oakland, California is the billing station.

Mr. Collett: It is agreeable?

The Court: What is that?

Mr. Collett: It is agreeable.

The Court: You so stipulate? [56]

Mr. Collett: Yes, so stipulate.

The Court: Is that the fact?

A. That was my understanding as explained to me by Mr. Gottstein.

Mr. Collett: Q. Calling your attention to Government exhibit 5——

And, if the Court please, the various documents have already been admitted into evidence and I have made the statement to the Court that the various billings that have already been testified to by this witness cover all of the other counts. It is simply a repetition, changes of dates, different shipments made at different dates, but the evidence pertaining to each of the shipments is substantially the same, so that I am now going to proceed to identify by time and the particular commodity that

(Testimony of William L. Harrison.)

were shipped in order to bring before the Court the ultimate problem which I believe will be presented to the Court and that is the particular item which in each count is charged as having been a shipment of dangerous explosives outside of the authority of the defendant—in order to expedite time—the first document—all of the documents are in evidence—and in order to facilitate getting through these various counts to a conclusion.

Q. Calling your attention, Mr. Harrison, to Government exhibit 5, those documents are similar, are they, to the [57] documents you previously examined with regard to the shipments by the defendant? A. Yes.

Q. What is the commodity in that particular exhibit?

A. 14 boxes of rocket ammunition with empty projectiles.

Q. Is that stated as having been shipped?

A. Yes.

Q. On what date?

A. November 3, 1950.

Q. November 3, 1950? A. Yes.

Q. What was the charge as indicated from the document?

A. The freight, total cost of freight charges $737.20.

Q. Does the exhibit in itself disclose whether or not that amount was paid?

A. This particular exhibit does not.

Q. Did you in the process of your investiga-

(Testimony of William L. Harrison.)

tion receive any other information as to whether or not it was paid, from any representative of the defendant?

A. Yes, I did. From Mr. Gottstein.

Q. What did he state?

A. He stated that it had been paid.

Q. And from your investigation and from the exhibit. Government exhibit No. 5 what was the point of origin insofar as this defendant, the point at which the defendant took [58] custody for shipment? A. Oakland, California.

Q. And to what destination?

A. Fort Lewis, Washington, near Tacoma, Washington.

Q. Now calling your attention to Government exhibit 6 (handing witness). It contains similar documents by which you have previously examined?

A. Yes.

Q. And does that show a shipment of 540 boxes of ammunition for cannon with explosive projectiles? A. Yes.

Q. And the point of origin of the shipment insofar as this defendant is concerned was what?

A. Oakland, California.

Q. And to where?

A. Fort Lewis, Washington.

Q. And the date?

A. November 10, 1950.

Q. And the charges?

A. $703.80 total charges.

Q. Is that $703 or $743? A. $743.80.

(Testimony of William L. Harrison.)

Q. Does that document indicate whether or not it was paid?

A. Yes, this document does.

Q. It is stamped "paid" is it? [59]

A. It is stamped "cleared transportation clearings,"—I cannot explain what transportation clearings is, but it was verified with Mr. Gottstein. [60]

* * * * *

Mr. Collett: Q. I show you Government exhibit 11. (handing witness). Does it show the shipment of *533* of hand grenades? A. Yes.

Q. The date?

A. On December the 17th, 1950.

Q. 1950—and the charge?

A. Total charges were $737.20.

Q. The charge $695.40, does that appear as a charge in those documents? A. Yes.

Q. What is the difference between the $695.40 and the amount you just gave?

A. There was a correction bill issued on this particular instrument because of the—from the original charge and what was ultimately collected —by virtue of a beyond movement out of Portland, Oregon.

Q. Is there a Government bill of lading included in that group?

A. Yes, there was a Government bill of lading included.

Q. What does the Government bill of lading show?

A. The Government bill of lading is number

(Testimony of William L. Harrison.)

WV 3045982. Shows a shipment of 534 boxes of hand grenades from Herlong, [64] California to Lacota, Oregon—which is out of Portland, Oregon —an ammunition dump in that area.

Q. From Exhibit 11, what was the point of origin, insofar as the defendant was concerned that took custody of this shipment?

A. Oakland, California.

Q. And to where?

A. To Portland, Oregon.

Mr. Russell: Counsel, might ask for purposes of information——

(Thereupon ensued discussion between Counsel.)

Mr. Collett: Q. The correct amount of the shipment is what?

A. 534 boxes of hand grenades.

Q. 534 boxes of hand grenades? A. Yes.

Q. Count number 9 charges 543 boxes of hand grenades. The document itself discloses that there was a shipment of 534, is that correct?

A. That is correct.

Q. The amount of the charge, I don't think I asked that question—what was the amount of the charge of the shipment?

A. Total charges 737.20.

Q. Oh, you did answer that and you explained the difference between 695 and what was paid. [65]

A. Yes.

Mr. Russell: Am I to understand, Counsel, in

(Testimony of William L. Harrison.)

inquiring on these questions that the basis of the witness' answers as to the sources of his information and otherwise is the same as indicated previously unless specifically stated to the contrary, to avoid by objection?

Mr. Collett: Yes. [66]

* * * * *

Q. I show you Government exhibit number 14 (showing witness). Does that show the shipment of 500 cases of ammunition for cannon with explosive projectiles? A. Yes.

Q. Date? A. April 17, 1951. [68]

Q. And what was the amount of the charge?

A. $752.40.

Q. Was that paid? A. Yes.

Q. What were the two points of shipment?

A. Originated at Oakland, California, with respect to this defendant, and was destined and transported to Fort Lewis, Washington. [69A]

Q. Show you Government's Exhibit 15; that shows a shipment of 675 boxes of ammunition for cannon with explosive projectiles? A. Yes.

Q. For what date? A. April 18th, 1951.

Q. And as far as this defendant is concerned, the shipment was between what two points?

A. Oakland, California and Pomona Siding, Yakima, Washington.

Q. And the charge? A. $786.60.

Q. And was that paid? A. Yes.

Q. Show you Government's Exhibit 16, Count 14, if the Court please—that shows a shipment of

(Testimony of William L. Harrison.)

210 boxes of ammunition for cannon with explosive projectiles? A. Yes.

Q. And the date?

A. On April the 20th, 1951.

Q. And the charge?

A. $786.60, total charge.

Q. Was that amount paid? A. Yes.

Q. And the two points of shipment, as far as this defendant was concerned? [70]

Q. Oakland, California to Yakima in Washington.

The Court: For whom, for the Sierra Ordnance Depot?

The Witness: Yes.

The Court: Count 15?

Mr. Collett: Count 15, yes, if the Court please.

Mr. Collett: Q. Government's Exhibit 17, (handing to witness); does that show a shipment of 246 boxes of ammunition for cannon with explosive projectiles? A. Yes.

Q. The date? A. April 26, 1951.

Q. And the charge for the shipment?

A. $786.60.

Q. Was that amount paid? A. Yes.

Q. And what were the points of origin to which shipped by this defendant?

A. Oakland, California to Yakima, Washington.

Q. That was for the Sierra Ordnance Depot?

A. Yes.

Mr. Russell: In order that the record may be

(Testimony of William L. Harrison.)

clear, counsel, may it be stipulated that the Sierra Ordnance Depot was located at Herlong, California, as distinguished from Oakland?

Mr. Collett: Surely; it was for the Sierra Ordnance Depot. [71] Count 16, if the Court please.

Mr. Collett: Q. Government's Exhibit 18 (handing to witness); does that show the shipment of 1084 cases of ammunition for cannon with explosive projectiles? A. Yes, sir.

Q. Date? A. April 27, 1951.

Q. And the charge? A. $786.60.

Q. Was that paid? A. Yes.

Q. And the shipment was from what two points insofar as this defendant is concerned?

A. Oakland, California to Yakima, Washington.

Q. Was that likewise for the Sierra Ordnance Depot? A. Yes, sir.

Q. That Sierra Ordnance Depot is located at Herlong, do you know that?

A. Yes, that is true.

Q. Call your attention to Government's Exhibit 19——

The Court: Covering Count what?

Mr. Collett: Count 17.

Mr. Collett: Q. Does that show the shipment of 232 boxes of rocket ammunition for cannon with empty projectiles? A. That's right. [72]

Q. Date? A. On May 6th, 1951.

Q. Charge? A. $965.20.

Q. Count 17 charges the amount of $752.40. Is

(Testimony of William L. Harrison.)

the difference between the amount which you have just stated and that amount indicated?

A. The amount which you indicated, $752.40 was the rate to Seattle. The difference is because this was a beyond movement, and the total charge was $695.20, because the total charge——

Q. The transportation that was effected by this defendant was from what two points?

A. Oakland, California to Seattle, Washington.

Q. And the $752.40 covers the charge for that transportation?

A. To Seattle, Washington; yes.

Q. And was that paid? A. Yes.

Q. Is that likewise for the Sierra Ordnance Depot? A. That is true.

Q. All these counts for the Sierra Ordnance Depot? A. Yes. [73]

* * * * *

Q. Call your attention to Government's Exhibit 21——

The Court: What count?

Mr. Collett: Count No. 19.

Mr. Collett: Q. Does that show the shipment of six hundred fifteen boxes of ammunition for cannon with explosive projectiles?

A. That's right.

Q. And the date of the shipment?

A. April 18, 1951. [74]

Q. The count charges the 19th day of April.

A. It moved also on both the 18th and the 19th.

Q. And the amount of that charge?

(Testimony of William L. Harrison.)

A. Is $786.60.

Q. Is that paid? A. Yes.

Q. And the two points of shipment as far as this defendant is concerned were from where to where?

A. Oakland, California to Yakima, Washington.

Q. And that was likewise for the Sierra Ordnance Depot? A. That's correct.

The Court: Count what?

Mr. Collett: This is Count 20, if the Court please.

Mr. Collett: Q. Government's Exhibit 22 (handing to witness); that shows a shipment of 18 boxes of black powder? A. That's right.

Q. The date? A. On May 1st, or second.

The Court: Did you say 19 or 18?

The Witness: 18.

Mr. Collett: The count, if the Court please?

The Court: No, the black powder.

Mr. Collett: 18 boxes of black powder.

The Court: I thought you said 19.

Mr. Collett: I guess I didn't enunciate clearly.

The Witness: It is 18 here, your Honor.

Mr. Collet: 18 boxes of black powder?

A. That's right.

Q. On the first day of May, 1951, and between what two points as far as this defendant is concerned?

A. Oakland, California and Seattle, Washington?

Q. The charge?

(Testimony of William L. Harrison.)

A. That would be $752.40, total rated to Seattle.

Q. And what that paid? A. Yes.

Q. That was likewise for the Sierra Ordnance Depot? A. Correct.

* * * * * [76]

Mr. Collett: That leaves fifteen.

The Court: There remains fifteen counts?

Mr. Collett: Fifteen counts, yes. Now I offer in evidence Motor Carriers Explosive and Dangerous Articles Tariff No. 6 and No. 7, from which the suitable and pertinent portions will be read to the Court.

I don't think counsel has any objection to them.

Mr. Russell: No, we have discussed this matter briefly previously, if the Court please. The pertinent matters contained in these two documents are derived from regulations of the Commission contained in the Federal Register. The book, however, in which they appear, which is the only convenient form in which we can have them, is a private publication and there are very minor differences in language, particularly with respect to cross-reference regulations, that I think have no pertinence here. I have no objection to the documents, with the understanding that if any time any [77] particular language becomes a matter of dispute, we might supplement it with the Federal Register as the best record.

The Court: That is agreeable?

Mr. Collett: Yes, indeed.

The Court: It may be admitted in evidence to be

(Testimony of William L. Harrison.)

used by either side for whatever purposes are desired.

The Clerk: Government's Exhibit 23 and 24 for identification are now admitted in evidence.

(Whereupon Government's Exhibits 23 and 24 for identification only were received in evidence.)

Mr. Collett: That is all of Mr. Harrison.

The Court: Just a moment.

Mr. Collett: Excuse me.

The Court: You don't want to shut out counsel?

Mr. Collet: Certainly not.

Cross Examination

Mr. Russell: Q. Mr. Harrison, you mentioned in the course of your direct examination having first contacted, I believe, a Mr. Zweben?

A. That's correct.

Q. Of West Coast Fast Freight. Was he the first person to whom you spoke to direct your inquiry?

A. I can't say definitely. I may have talked with Mr. Roberts, the vice president first; and then been referred to Mr. Zweben. Or the first time I called, possibly Mr. [78] Roberts wasn't there and I saw the next man in the level of importance.

Q. In other words, Mr. Zweben was the man to whom you were referred for the information that you particularly were seeking at that time, is that correct, sir? A. That is correct.

Q. Mr. Zweben was, was he not, the general au-

(Testimony of William L. Harrison.)

ditor of the company in charge of its books and records?

A. Yes, that is my understanding.

Q. And as I understand it, his office was located at Seattle? A. That is correct.

Q. And Mr. Zweben in turn referred you to Mr. Gottstein?

A. Both Mr. Gottstein and Mr. Castellano, I believe is the gentleman who is in charge of the trip report records.

Q. As I understand it, his participation was simply to furnish you with such trip report records as you might request? Am I correct in that, sir?

A. That is correct.

The Court: Trip report records; what does that mean?

Mr. Russell: Perhaps I can clarify it by some questions.

Mr. Russell: Q. The trip report record is a record of the description of the truck, its drivers, its numbers and the point of its origin and destination, is that not correct, essentially, sir? [79]

A. That is correct, and it serves a pay roll purpose for drivers.

Q. It does not purport to deal as such with the load that is hauled; other records purport to do that? A. That's correct.

Q. Now it is correct, is it not, sir, that Mr. Gottstein was also in the accounting department of the company at Seattle?

A. I can't say that for certain. My understand-

(Testimony of William L. Harrison.)

ing was that I was turned over to him because all of these shipments were on Government bills of lading and I was told by Mr. Zweben, I believe, that Mr. Gottstein was in charge of all bill of lading shipments. Now——

Q. He was a bill of lading clerk or a bill clerk of the company, particularly handling government traffic, isn't that the way it was explained to you?

A. That was my understanding, that's right.

Q. Now your conversations with Mr. Gottstein were at Seattle? A. Yes.

Q. And it is correct, is it not, sir, that Mr. Gottstein at no time ever undertook to advise you that he had any personal knowledge from observation of the equipment, either at Seattle or elsewhere, as to what may have physically been on the equipment, from his own observation? [80]

A. Well, he didn't go any farther than what appeared on the face of the documents.

Q. That is exactly what I am getting at. In other words, such information as Mr. Gottstein gave you was also taken from the documents and perhaps from the familiarity he had with their usage, to interpret them for you, such as indicating what the code number nine meant?

A. That is correct.

Q. So that your information obtained from Mr. Gottstein was basically from the documents which we have here, exhibits 3 through 22 inclusive?

A. That is correct.

Q. I understand also that you made two investi-

(Testimony of William L. Harrison.)

gations of the company? A. That is correct.

Q. They were both made at the offices in Seattle?

A. Yes.

Q. Now I would like to call your attention for a moment to exhibit 7, which is—I should say exhibit 24, particularly to the section or the portion thereof, the sub-numbers, which are the seventy-three series, 73.50 and following, and ask you if it is not true generally, sir, that the language—specific language—contained in the description of commodities and exhibits 3 through 22 conforms with some exactness to the language used in that portion of exhibit number 23? [81] For example, sir, I call your attention to the portion, if I may approach the witness——

The Court: You are now directing his attention to what and from what document?

Mr. Russell: I am directing his attention to exhibit number 23 at page 36.

The Court: Which is what?

Mr. Russell: The description of the regulations as contained—of the Commission, contained in this document.

The Court: Very well.

Mr. Russell: Q. Particularly to 73.54. There is a heading "Ammunition for cannon" you will notice.

The Court: Ammunition for what?

Mr. Russell: For cannon. I mention this merely as being descriptive.

Q. It is generally true, is it not, sir, that the

(Testimony of William L. Harrison.)

language adopted for describing commodities in these specific exhibits 3 through 22 follows, generally speaking, the language of these regulations?

Mr. Collett: Well, are you speaking—an objection, if the Court please. Are you speaking generally or specifically, now? You have mentioned something specifically and then you just asked the question generally. I think the question is ambiguous, perhaps.

Mr. Russell: Well, I was trying to cover it too rapidly, [82] it may be. Withdraw the question.

Mr. Russell: Q. I ask you, sir, if it is not true that certain of the language contained in exhibits 3 through 22 uses the word "Ammunition for cannon" as its basis of description.

Mr. Collett: Well, if the Court please, I will object; I think he might take the language he is referring to and indicate wherein the language may be contained in the tariff. Otherwise, it is ambiguous and a very general statement.

Mr. Russell: Well, if I might have a moment to pull one of these, then, to use as to that.

(Conversation between Messrs. Collett and Russell out of hearing of the reporter.)

Mr. Russell: Q. With reference to the item to which I called your attention before, item numbered 73.54, I believe on page 36; there is contained in that regulation a description, "Ammunition for cannon with explosive projectile," is there not?

A. Yes, those words are here.

(Testimony of William L. Harrison.)

Q. Yes. And I would like now to ask you, sir, with that example before you—I will strike that question.

Are you generally familiar with the phraseology and terminology used in the various sub-paragraphs in part 73.54 and subsequent, in these regulations? [83]

A. I am not so familiar with that language; I am more familiar with the language used in the classification in the first section of this tariff, section 71.

Q. Perhaps we can solve that. Would you turn to the classification with which you are familiar?

A. This is part 72, the commodity list and classification.

Q. Which undertakes to be a brief list of different items, I mean a brief naming of different items?

A. That is true.

Q. I ask you to check that list and find out whether or not you find the word, for example, "Ammunition for cannon with explosive projectile." A. That is correct.

Q. And generally speaking, if I were to ask you the same questions with respect to each of the commodities which are listed in the information, the terminology would follow essentially that pattern, would it not, sir?

A. It would follow almost verbatim the pattern as classified in the commodity list under part 2 of this tariff.

(Testimony of William L. Harrison.)

The Court: Wait a minute. I am not following clearly. What are you saying there?

The Witness: This is the motor carrier's explosive and dangerous articles, under the tariff. In part 2 they have listed, I would say, practically every conceivable type of explosive and dangerous article, and they have classified [84] them. In respect to explosives, they are classified as to the A type explosive, the B type and the C type period.

The Court: And what are these classified as, these materials we are dealing with here?

The Witness: Those counts 3 through 20, excluding the ones which have been dismissed, are all either A or B.

The Court: That is correct?

Mr. Russell: Yes. I intended to go into that more fully in a few moments.

The Court: All right, pardon me.

Mr. Russell: Q. Now Mr. Harrison, is it not also true that if the description which you have referred to in part 72, as compared with the description in part 73, that there you will find some elaboration of that description, to include a more detailed outlining of what actual items are included there, in most instance? A. That is correct.

The Court: Wait just a moment. What is correct?

The Witness: That these classifications are expanded upon to some extent over in the body of the tariff, because this part of it here pertains to

(Testimony of William L. Harrison.)

shippers and packing instructions and things of that nature.

The Court: I see.

Mr. Russell: Q. Would it not be true, Mr. Harrison, that taking our example, "Ammunition for cannon," that that [85] might be used by the person selecting the language to include, for example, everything from something as small as a 20 millimeter shell up to a 17 inch shell for a major naval rifle?

Mr. Collett: Well, object to that question; it seems to be going far away, to me.

The Court: Q. Do you know?

A. No, I haven't the slightest idea.

Mr. Russell: Q. Do you not know the answer?

A. No.

The Court: Well, I haven't the faintest conception of it; I just wondered if he had.

Mr. Russell: Q. Mr. Harrison, I would like to ask you, sir, is it not true from your own knowledge that from time to time the government may describe an article as something other than what it actually is for security reasons?

Mr. Collett: Well, I will object, if the Court please, that that is immaterial and irrelevant to the matter before this Court.

The Court: Does that enter upon the trial of this case on the merits?

Mr. Russell: What did you say? I am sorry.

The Court: Does that enter the trial of this case on its merits?

Mr. Russell: I only seek to develop, if the Court

(Testimony of William L. Harrison.)

please, [86] further basis for my motion in connection with these particular exhibits, to show it to be a fact, whether it is the fact as to these I frankly do not know, because we have never to this day had access to the product; that it is possible for the Government intentionally and for purposes of security to define an item as Item A when it is something else.

The Court: Well, I will give you a record. Objection overruled, you may answer if you know.

A. Well, the best answer I can give to that is that on some of the bills of lading which I did observe—I didn't observe them all, because they were in the process of accomplishment, which means when they are sent on to be paid. But there is generally stamped on that bill of lading that this commodity is described according to the explosive tariff and that it is packed and crated in compliance with the regulations as contained in this tariff and so named. Now that is all I know.

Mr. Russell: Q. Now in all fairness, sir, if the Government were undertaking to move something of a highly secret character, they might well do that to throw people away from any curiosity, even though the article was not the article in the truck?

Mr. Collett: Objection, if the Court please. I think that is highly argumentative. [87]

The Court: Sustained.

Mr. Russell: All right.

Mr. Russell: Q. Turning to another subject, Mr. Harrison, was it not the fact sir, that at the time of

(Testimony of William L. Harrison.)

both of your inquiries at West Coast Fast Freight, you found them to be cooperative in furnishing you with the information that you asked for?

Q. Would it not be true, sir, that they made no effort, or you saw no effort of any attempt to disguise or conceal any of these things that they had been doing with respect to the transportation of the various shipments involved in the information?

A. No, they did not.

Q. And that would apply also to others that you may have inquired about? A. That is true.

Q. At the time of your investigation, either in March or in May, did you advise or undertake to advise the company of any conclusions that you may have reached as to the propriety or lack of propriety of handling these particular items? A. Yes.

Q. To whom did you talk?

A. I stated my conclusions.

Q. Those were your conclusions?

A. My conclusions. [88]

Q. I notice that you phrase it in that way; do I take it from that, sir, that you felt that you were not qualified to state what the Commission's conclusions might be with respect to that?

Mr. Collett: I object, if the Court please. He has stated his conclusions.

The Court: Let him answer if he knows.

A. Well, just as a matter of policy, I didn't consider and haven't considered that I was in a position to bind the Commission on a matter of this kind, is all.

(Testimony of William L. Harrison.)

Q. You were appearing there to investigate this transportation as a representative of the Commission? A. That is correct.

The Court: He didn't want to be tried by the Commission himself.

Mr. Russell: Q. If I understand you, sir, correctly, you indicated certain opinions which you clearly evidenced were your own, as to whether this might be proper or improper?

A. That is correct.

Q. Did your knowledge did you ever cause any notice to be given to this carrier after your investigations or either of them had been completed, that the Commission considered this to be an improper transportation?

A. I did not. I reported the facts that I found to my superiors. [89]

Q. And did you make recommendations with respect to them?

A. Yes, I made a recommendation.

Q. To your knowledge, sir, at any time prior to the time that this information was filed was any notive given to the carrier by the Commission or any of its representatives?

A. Not to my knowledge.

Q. With respect to the propriety of lack thereof of handling these? A. That is correct.

Q. When you made your investigations, did you find out that an application was pending before the Commission, the one which is the subject of Exhibit 2 in this proceeding? A. That is correct.

(Testimony of William L. Harrison.)

Q. Did you make any inquiry to find out what the nature of that application was?

A. Limited inquiry. I didn't study the application.

Q. Were you advised by any representative of the applicant at the time of the first investigation that a hearing was shortly to be held in connection with it?

Mr. Collett: Oh, I object, if the Court please; I don't see what the materiality of this may be.

Mr. Russell: I think, if the Court please, if I may express it, the obvious purpose of Exhibit 2 as offered by the Government is an attempt to reflect that we had notice or knowledge of the possible deficiency in the certificate, [90] and I am seeking here to develop the full facts with respect to the nature of that application and why it was filed, if this witness does know, to counteract the possible inference from that application that the defendant had knowledge of the deficiencies in its certificate.

The Court: Assume he had no knowledge; then where would be find ourselves?

Mr. Russell: I think, if the Court please, that assuming this witness had no knowledge or assuming that the defendant had no knowledge?

The Court: Assuming this witness—or the defendant.

Mr. Russell: Well, I am not sure that I understand for sure the Court's question. If the defendant had no knowledge I think it would be material on

(Testimony of William L. Harrison.)

the question of the wilfullness of the violation, which is a provision of the statute.

The Court: Yes, I agree with you thus far; but that wouldn't excuse the violation.

Mr. Russell: I think it has to be wilfull and knowing violation.

The Court: Yes.

Mr. Russell: And I think the offer of Exhibit 2 is for the purpose of attempting to establish that it was wilfull and knowing, and I am seeking to bring out from this witness, if he knows, the fact that the application was filed for a different purpose. [91]

The Court: I will give you a record on it. He may answer. Do you understand the question?

The Witness: The only purpose that arose in my mind is just what is on the written record. It was certainly my reaction to the filing of that application to the defendant finally recognizing that it didn't have authority to transport dangerous explosives and it proceeded to seek authority to do so.

Mr. Russell: Q. I notice you said that it was your reaction. Was that conveyed to you by any representative of the defendant? A. No.

Q. Were you ever advised by any representative of the defendant that that application had been filed for the purpose of clarifying in a proper proceeding before the Commission what it might be that the defendant could haul? A. No.

Mr. Collett: Well, I object——

Mr. Russell: Q. Did you ever make any effort

(Testimony of William L. Harrison.)

to examine the transcript of the testimony contained in that proceeding?

Mr. Collett: I will object, if the Court please. This is not material and is posing a burden upon this witness to investigate a transcript.

The Court: Well, since there is an offense charged, I will allow the widest latitude. The jury is absent; proceed. [92] You may answer. I will give him a record on it.

A. Well, as I recall, there wasn't any transcript or hadn't been any hearing had at the time this investigation was made.

Mr. Russell: Q. You are speaking now of the first or the second, sir?

A. Both. Was the hearing held on April 26th, wasn't it?

Q. I believe that is my understanding, sir.

A. Well, I was in the process, about that time; in other words, the record had not been made in the docket at the time. I have since reviewed the transcript.

The Court: Q. Tell me for my own information, how is it that this matter first was called to your attention?

A. This whole proposition?

Q. Yes. This matter that is now pending before this Court; how did that come to your attention?

A. Our safety men were conducting a road check. That is where they go out on borders and stop these vehicles, and they stopped a vehicle operated by the defendant company for examination

(Testimony of William L. Harrison.)

and inspection, and they found that they were transporting what to that inspector was dangerous explosives.

The Court: I don't want you to be bound by that. I just wanted to inquire myself. That was off the record.

Mr. Russell: Yes, sir.

Mr. Russell: Q. Mr. Harrison, I believe you indicated some familiarity with Exhibit No. 23. Is that the [93] document before you?

A. No. 23 is Tariff No. 7.

Q. It is a fact, is it not, sir, that that document undertakes to set forth in some detail regulations prescribed by the Interstate Commerce Commission governing the transportation of the explosives and other dangerous articles, which regulations were issued pursuant to the transportation of the Explosives Act? Is that not correct, sir?

Mr. Collett: Doesn't the document speak for itself?

Mr. Russell: I don't think this will reflect that fact.

A. Well, I don't know as I exactly understand your question. That is a tariff published by a tariff publishing agent, and it is published on behalf of participating carriers. It does include the regulations, generally speaking, as prescribed by the Interstate Commerce Commission, with respect to transportation of explosives by rail, by motor carrier and highway, and by express and water. It also contains instructions to shippers with respect to

(Testimony of William L. Harrison.)

packing, crating, and it is an excellent dissertation and compilation of what the explosive regulations are as published by the carriers who are participating members of that tariff.

Mr. Russell: Counsel, in order that we may avoid any difficulty—this is what was in my mind. I thought we might have some such statement made. Might it now be understood that the portions, at least, of Exhibit 23 which undertake [94] to set forth descriptions of packaging, descriptions of commodities, regulations governing rail carriers, motor carriers and all parts with the possible exception of the statement showing participation of carriers therein, may be deemed to be the same as the regulations themselves? We are now getting into a dispute as to the validity of the document.

The Court: We will take a recess and you gentlemen will have an opportunity to think that over.

(Recess.) [95]

Afternoon Session, Tuesday, April 15, 1952
at 3:30 o'clock p.m.

Cross Examination—(Resumed)

Mr. Russell: Q. Mr. Harrison, I was asking you before the recess questions with respect to Exhibit 23. Would it not be correct, sir, that parts 72 through 78 appearing in pages 5 through 288 of that document set forth in substantially verbatim language the official regulations of the Interstate Commerce Commission with respect to the transportation of explosives and other dangerous articles?

(Testimony of William L. Harrison.)

A. I think that is correct.

Q. So that——

A. The tariff on the cover sheet so states, that it is a publication of the rules and regulations as prescribed by the Interstate Commerce Commission. I have not compared it word for word, but I think that is substantially correct.

Q. Now, sir, that constitutes, does it not, the official designation by the Commission, arising out of a proceeding that has been continuing for some years, of the Commission's definition and rules and regulations with respect to the transportation of explosives by motor carrier, by rail and by other forms of transportation?

Mr. Collett: I object, if the Court please. He has already testified that tariff is a publication by combinations of motor carriers. Now he is speaking about the Interstate [96] Commerce Commission regulations. The Interstate Commerce Commission regulations would be an official publication, would be in accord with the Code Federal Regulations as originally published in the Federal Register and which come according to the last statement embodied in that tariff by those who publish the tariff. My objection runs that that question is not——

The Court: You do not want to limit it to these regulations?

Mr. Collett: Well, no. *International* Commerce Commission does not publish this. The Interstate Commerce Commission does not nor does the Government in any form publish this document.

(Testimony of William L. Harrison.)

The Court: I understand that.

Mr. Russell: Well, in order that we may be clear, this was the matter that I raised just before the recess. It was my understanding in stipulating to the admissibility of this document that one of the purposes, shall I put it in that way, of bringing it in was that this is the only place in which these regulations appear in conveniently published form so that they can be readily used as an exhibit and it was my understanding that in making my stipulation and with my discussions with counsel prior to its offer that we might consider those portions of the documents which are in fact a republication, if you will, [97] of the regulations themselves for the purposes of our interrogation here, with full understanding they had been privately published.

Mr. Collett: That is substantially correct, that what it states on the face of the document, that it is a publication of the regulations, and likewise that it is a publication by the combined group of motor carriers, in which they have established their tariff which regulates their operations. As such necessarily as a matter of law the regulations are determinative and would be determinative. It is a convenient form of presentation, as it stated on the cover sheet in itself.

The Court: I don't understand what the problem that counsel has with regard to the significance of that document as such.

Mr. Collett: My purpose is that I wish to interrogate the witness some with respect to the con-

(Testimony of William L. Harrison.)

tents on the basis that we are talking about the regulations of the Commission and I do not want to be faced with the objection of counsel, after I have finished, that I have not been referring to something which in language is the same in all particulars as the language of the Commission. In other words, if we are going to have a question as to the accuracy of the material contained in Exhibit 23, then I would prefer to address the questions to the witness only after I have been able to [98] get available a copy of the regulations themselves.

I am fully aware, by comparison on my own account, that there are a few places. An example would be that they would say "as provided in this part" and in this document they will say "in part number so and so" or part—and I don't think any of them are material. That is why I was willing to accept the document as a statement of the presently effective regulations as such in lieu of bringing in the Register.

Mr. Collett: If the Court please, I haven't any idea what counsel is anticipating. I have seen no reason so far for any objection but if he thinks that there is going to be objections simply to obstruct the cross examination, there is certainly no such intention. If there is not——

If there is a nonconformity in that publication with the regulations as such, I think we would have a perfect right to object.

But I haven't any idea what counsel is anticipating. In fact, I got a little suspicious that there may

(Testimony of William L. Harrison.)

be something in there that isn't in these regulations.

The Court: I haven't anticipated either, but on the statement that he has made the objection will be overruled. Proceed.

Mr. Russell: Q. Mr. Harrison, you have indicated previously you have some familiarity with that document? [99] A. Yes.

Q. I would like to ask you, sir, are not the rules and regulations as set forth therein, giving due regard for my explanation of minor differences, the regulations which the Commission has provided governing the transportation of explosives and other dangerous articles? A. I think that is correct.

Q. Now, sir, would you take that document—well, let me ask you first. Have you made any investigation to find out whether or not the regulations in the form in which they appear in Exhibit 23 were in effect during the period from September 1, 1950, through May 6, 1951, in substantially their present form?

The Court: According to the dates on there?

Mr. Russell: I appreciate the document is published after that, but the regulations themselves preceded.

Mr. Collett: Then this question is not related to this document. It is related to the actual publication of the regulations?

Mr. Russell: The question is, is it not true that the regulations, substantially as they appear in this document, were actually in effect during the period covered by the information?

(Testimony of William L. Harrison.)

The Court: You may answer.

A. Not entirely. [100]

Mr. Russell: Q. I wonder if you would explain that answer, sir, and tell me if there are any material changes that had been made?

A. May I see tariff number 6, which is in evidence?

The Court: Yes.

Mr. Russell: I will withdraw that question, sir, and ask you another. Perhaps we can get along faster.

Q. I will call your attention to section 73.50, .51, and .52 of these regulations?

Mr. Collett: What were the numbers again?

Mr. Russell: 73.50, .51 and .52.

Might I approach the witness, if the Court please, to be sure I have given those numbers correctly?

The Court: Yes.

Mr. Russell: Q. Can you tell, me, sir, is it not a fact that those specific provisions, were in effect in substantially their present form as early as May 3, 1950?

A. I really can't answer that without seeing the prior publications, because I have not compared them word for word.

Q. And you are speaking there of tariff number 6 or other documents?

A. Well, tariff number 6 and the supplements thereto.

Mr. Russell: Counsel has been kind enough to provide me with a copy of the Federal Register.

(Testimony of William L. Harrison.)

Q. I will [101] call your attention, Mr. Harrison, to the issue thereof of February 24, 1950, and particularly to page 93 of that Register, and ask you, sir, to compare sections 73.50, 51 and 52 as they appear in the Register and tell me whether or not they do not substantially—comply exactly with the language as it appears in Exhibit 23 for the corresponding section numbers?

A. That is correct.

Q. And with this before you to refresh your recollection, is it not a fact that the regulations in their form as shown on Exhibit 23 then became effective as a result of that on May 9, sixty days after the date of that—or, May 3, I should say, 1950?

A. Yes, I think is the effective date of this correction.

Q. Now, sir, with that thought in mind. I would like to return to the question that I asked of you earlier where you indicated that there were some other changes. Did you have specific changes other than that one in mind at that time?

A. Well, I think explosive tariffs have been published for endless years under the explosive act regulation of explosive articles, and they are subject to constant change.

The Court: If I follow your thought, while there may have been changes, minor changes, they have no application to your problem here. [102]

Mr. Russell: That is my understanding.

Q. Would that be a correct statement, the

(Testimony of William L. Harrison.)

changes that have been made would have no application to our problem here?

The Court: If you know.

A. No, I think that the changes that have been made for the date of the publication, dangerous articles, tariff number 6, which were effective in 1949 to and including the date of that Federal Registry entry, that there are substantial changes in the definition and the description of dangerous explosive.

Mr. Russell: Q. Well, let me ask the question this way, sir. Then you were referring to changes pertinent to the definition of dangerous explosives?

A. That is correct.

Q. And is it not true, sir, that the Federal Register, to which I called your attention, is the issue of the amendment to regulations which accomplishes that change?

A. That is my understanding of it, yes, sir.

Q. And that, to be sure we have the record clear, became effective on May 3 of 1950, as I pointed out to you a moment ago.

A. The supplements to number 6 are not in evidence, but that Federal Register entry is included, I think, in supplement number 5 to tariff number 6, and the effective date is stated on that supplement. [103]

Q. That would be the date of the private publication? A. That is correct.

Q. But so far as the Government regulation defining terms, it became effective May 3, did it not?

(Testimony of William L. Harrison.)

A. To my best recollection it did, that is correct, and that tariff was amended to reflect that change.

Q. Now, sir, I would like to ask you if you can take exhibit number 23, or any of the Federal Register changes or tariff supplements that you may have mentioned, and show me any point in any of those documents where the words "dangerous explosives" is defined by the Commission anywhere in those regulations?

A. Well, I can take the tariff number 6 and I can give you a pretty good definition of it and I can also tell from the standpoint of definition, give you —cite you reported decisions of the Commission where they have interpreted.

Q. You are referring to exhibit number 22 (* reporter's note exhibit 24), I believe, when you say tariff number 6? A. Yes.

Q. So you will have it before you (handing witness). But the material which is contained in Exhibit 26, so far as it has material pertaining to definition, was not in force from September 1950 to April 1951, is that not true, sir?

A. The wording of the definition was different than it is [104] in the Government exhibit number 24, that is correct. Used different wordage.

Mr. Russell: In order that the record might be clear, might it be understood that my last reference to an exhibit, which was to 22 was intended to mean 24?

The Court: Very well. The record will so show.

Mr. Russell: Q. We do come back to the fact

(Testimony of William L. Harrison.)

that the language as it shows in Exhibit 23 was the effective language of the Commission's regulations at the time the shipments moved, is that not true, sir? A. Substantially correct.

Q. Now, sir, will you point out to me any point in Exhibit 23 where the words "dangerous explosives" is defined by the Commission?

A. No, the wording in exhibit number 23 is different. There isn't any question about that.

Q. And it is a fact, is it not, sir, that the words "dangerous explosives" does not appear at any point in that document in any sections pertaining to definition, if it appears at all?

A. No, that is correct. Used those particular terms. They are definitions of dangerous explosives, or of explosives under the classification of A, class B, and class C. And class A explosives, in this newer tariff, number 7, defined as detonating or otherwise of maximum hazard. [105] Class B explosives are classified as inflammable hazard, and class C explosives as minimum hazard.

I might call attention also to the Court, however, that at the time that the certificate under which the defendant is operating was issued that this particular tariff was in effect.

The Court: This particular tariff?

A. This is Government exhibit number 24, which is the dangerous articles tariff number 6.

Mr. Russell: Q. Despite all your statements, sir, though we do come back to my question, the answer you gave to my question, that at the time

(Testimony of William L. Harrison.)

any of this traffic moved, the Interstate Commerce Commission regulations contained no definition of the the word dangerous explosives, is that not true?

Mr. Collett: If the Court please, I object. He answered the question and referred to Government exhibit number 24 which he states was in effect at the time which counsel is going to great labor to establish before this Court. The question is asked and answered.

The Court: It doesn't give the definition of explosives. You embodied the word "dangerous explosives."

Mr. Russell: No, your Honor, my question was directed to the word "dangerous explosives."

The Court: What? [106]

Mr. Russell: The word "dangerous explosives."

The Court: Yes.

Mr. Russell: Thereunder, takes to be in it a definition of the word "explosives" as section 73.50, but I believe it to be the fact that there is no definition therein of the word "dangerous explosives." That is true, is it not, sir?

A. Well, the Commission has resorted to numerous instances in its regulations, has been called upon to interpret the meaning of those regulations, and it has done so with respect to dangerous explosives.

Mr. Collett: I submit——

The Court: Explosives in themselves to my mind, would be a—— [107]

(Testimony of William L. Harrison.)

Mr. Russell: Well, that is where I bring—we are coming very close——

The Court: I say that just to advise you, so that you may, if I am in error—you can correct me.

Mr. Russell: Perhaps this would be a good moment to mention it. Because it goes to my statement which I made as the opening statement in this proceeding. I think that the lay—if I may use it that way—meaning of the word "explosive" does contemplate that there is an element of danger to all explosives. And that the distinction made by the Commission in our certificates, where sometimes the word "explosives" is used and other times "dangerous explosives" is used, and where, as the witness has indicated, at some time in the past they have classified explosives as dangerous, less dangerous and relatively safe in regulations which are no longer in effect, gives rise to the condition which establishes the fact that the word is here used as in the technical sense as distinguished from its common sense meaning. Perhaps I can develop that in this way, by asking the witness some further questions.

Mr. Russell: Q. You are referring, are you not, when you say to interpretations of the Commission, Mr. Harrison, primarily to a case decided by the Interstate Commerce Commission, Division 5, known as Stringland Transportation, extension, dangerous explosives, appearing in 49 MCC 595? [108]

A. That is correct.

Q. And is it not a fact that in that decision the

(Testimony of William L. Harrison.)

Commission undertook to define the words "dangerous explosives" as used in certificates by reference to the regulations which are before us in Exhibit 24?

Mr. Collett: If the Court please, I am going to object; it seems to me this is developing into a legal argument with this particular witness. I think I understand now that we have a quibble here between what is a dangerous explosive and what is a maximum hazard—it is apparently a distinction that counsel is making here.

The Court: Are you familiar with the case that he is quoting?

Mr. Collett: Yes, if the Court please.

Mr. Russell: I want to be sure, counsel, that we understand that I am not here quibbling on words. I think that I am supported in the motion which I am taking by a long line of Supreme Court decisions.

The Court: Well, whether I agree with you or not, I recognize your preparation in this case and I will give you a record on it.

Mr. Russell: Thank you, sir.

The Court: Subject to counsel's motion to strike, as I did the other evidence this morning. The Court will be fully informed. [109]

Mr. Collett: Well, let the record show, then, that the objection has been made.

The Court: It is going in subject to your motion to strike, over your objection.

Mr. Collett: Yes.

(Testimony of William L. Harrison.)

Mr. Russell: Q. My question—do you recall it, sir?

A. I think so. I had the answer once in my mind.

Q. I will rephrase it for you, sir. I ask you whether it was not the fact that in undertaking to explain the meaning of the words "dangerous explosives" in the case which I referred you to, the Commission made reference in the use of the words "dangerous explosives," also "less dangerous explosives and relatively safe," to its regulations, as prescribed and set forth in Exhibit 24, which is before us?

A. That is correct. And it made its determination upon the regulations which were in effect and which are in effect in both tariff No. 6 and No. 7, and to section 72, which classifies explosives as A, B and C. And it said in that case that explosives classified A are dangerous; B as less dangerous; and C as relatively safe.

Q. Now let's be sure. To refresh your recollection, did not the Commission say, "In the Commission's regulations governing the transportation of explosives and other dangerous articles by rail, freight, express and baggage service and by motor vehicle, highway and water, the various different explosives are classified as dangerous, less dangerous and relatively safe, rather than by any reference to Class A, B and C"?

Mr. Collett: If the Court please, I object; the case is reported in Vol. 49 of the Interstate Com-

(Testimony of William L. Harrison.)

merce Commission reports, and the case speaks for itself as a matter of law, for whatever probative effect it has.

The Court: I will make a determination on that, counsel, myself.

Mr. Russell: Very well.

Mr. Russell: Q. Let me ask you, sir—I don't wish to be running counter to the ruling of the Court, and this may be in the spirit of it; but in line with the statement made by the Court a few moments ago, it is a fact, is it not, that in the case to which I have referred, the Commission undertook to classify certain kinds of explosives, referred to in their regulations, as being in a category other than dangerous? A. Oh, yes, it has.

Q. So that they have used the word "dangerous" in a more limited sense than as being synonymous with the word "explosive" itself?

A. I think that is correct.

Q. Yes. Now the regulations to which they referred were changed, as you have indicated, on May 3rd of 1950, and it is [111] a fact, is it not, sir, that those words "dangerous, less dangerous and relatively safe," as they have theretofore been set forth in the regulations, were eliminated?

A. They did change the wordage, but they retained the Class A, Class B and Class C explosives. They applied different descriptive terms to them.

Q. Very well. That is exactly what I had in mind, sir. And is it not also true from your knowledge of the Commission's procedure and practice

(Testimony of William L. Harrison.)
that at least beginning in the year 1951 they desisted from their practice of describing in certificates, as an exception or otherwise, dangerous explosives and undertook to describe them as Class A, Class B or Class C, explosives, as defined in their regulations?

Mr. Collett: Well, I object, if the Court please. This is going outside this particular case, and also is the matter in which I think the regulations speak for themselves.

Mr. Russell: Well, I would like to be heard on that briefly. [112]

* * * * *

The Court: The objection will be overruled. If you know, you may answer.

Cross-Examination—(Resumed)

A. I do not know the answer to that question, because I have not examined any applications nor have I examined or been called upon in any respect to examine any applications.

Mr. Russell: Q. I take it, then,—what you understand from that, sir, is that then at least during the year 1951 you have not had occasion to examine certificates issued by the Commission dealing with the subject of explosives?

A. My answer to that is, the only one that I have had any opportunity to examine, is the pending application, in sub 34, [116] which was filed by the defendant.

Q. In this particular proceeding?

A. That is right.

(Testimony of William L. Harrison.)

Q. I would like now, sir, to call your attention to Exhibit No. 23, particularly Section 73.51 of that regulation, and ask you, are you generally familiar with those provisions?

A. I have read them, yes, but in the application of them I have had no occasion to apply them, in the sense.

Q. It is a fact, is it not, sir, that the explosives which are described in this particular regulation are described as being of such dangerous character that carriers are forbidden to transport them? Is that not the substance of the regulations?

A. Yes.

Q. And that section to which I have referred you immediately precedes the sections defining acceptable explosives, as being Class A. Class B and Class C; is that not correct, sir?

A. That is correct.

Q. So that it is true under the regulations, is it not, that there is a type of explosives which has a higher transportation hazard than those being described in Section 73.52 as maximum hazards?

Mr. Collett: Well, if the Court please, I object to that question as calling for an opinion and conclusion of [117] this witness, and the regulation speaks for itself as to what 73.51 says. It seems to me that is a matter likewise for the Court to decide.

The Court: There is that distinction, is there not?

Mr. Collett: If the Court please, one says for-

(Testimony of William L. Harrison.)
bidden and the other says acceptable explosives.

The Court: However, the objection will be overruled. If you know, you may answer.

A. I cannot answer your question as it was stated. I do not know, I am not an authority on explosives; and when you say that there are some that are more explosive than others, I can't answer it. All I know is that there are some that are forbidden.

Mr. Russell: Q. Perhaps that will answer my question, sir. In other words, those that are shown in 73.51, for one reason or another which you personally do not know, the Commission has said carriers may not handle at all?

A. That is what the book says, that is right.

Q. I see.

The Court: That is what the regulation says?

The Witness: That is right.

Mr. Russell: May I have just a moment to show what I was referring to, to counsel?

The Court: Surely.

(Conversation among counsel out of hearing of the Reporter.) [118]

Mr. Russell: Q. Mr. Harrison, I have available before me a transcript of the proceedings of yesterday. I wanted to ask you one or two questions further developing a statement contained at page 106 of the transcript and I would like to hand you the document. I have it open to 105, so that you may get the context, and marked on my copy

(Testimony of William L. Harrison.)

is the particular statement that I would like to have you familiarize yourself with. (Handing to witness).

A. (Examining document)

Q. Does reading it recall to your mind the thought that was being expressed there, sir?

A. I think so. [119]

* * * * *

Mr. Russell: Q. Returning, Mr. Harrison, to the reading, I will read you the question:

"Question: And it is a fact, is it not, sir, that the words 'dangerous explosives' does not appear at any point in that document in any sections [121] pertaining to definition, if it appears at all?

"Answer: No, that is correct. Used those particular terms. They are definitions of dangerous explosives, or of explosives under the classification of A, Class B and Class C. And Class A explosives, in this newer tariff, No. 7, defined as detonating or otherwise of maximum hazard. Class B explosives are classified as inflammable hazard, and Class C explosives as minimum hazard.

"I might call attention also to the Court, however, that at the time that the certificate under which the defendant is operating was issued that this particular Tariff was in effect."

Mr. Russell: Apparently making reference to No. 6.

Q. Is that what you had in mind, sir?

A. That is correct, Tariff No. 6.

Q. Am I to understand, sir, that from that state-

(Testimony of William L. Harrison.)

ment you mean that the words "dangerous explosives", as used in a certificate, must be interpreted with relation to the day or date upon which the particular certificate was issued?

A. No, I don't mean that the Court should get that impression.

Q. Well, what did you wish to convey by the expression?

A. What I mean to say is that when the defendant was issued their certificate, there was a restriction in that certificate [122] against the transportation of dangerous explosives, and when that certificate was written, and for a number of years, there wasn't any question, I might say, in my mind, and I can interpolate, in the Commission's mind, of what the dangerous explosives were. They had been set forth in Tariff No. 6, they had been defined.

The Court: Three classifications?

The Witness: Yes, sir.

A. (continuing) And they had been further defined and emphasized in the case which we referred to yesterday, which is the Strickland case, 49 Motor Carrier cases. Now that was the point that I intended to convey.

Mr. Russell: Q. But you do not intend to convey the thought that if a given item, for example, appeared at the time that the certificate was issued, under a classification of A, and because of advances in the science of explosives, its transportation characteristics had been radically changed and it were

(Testimony of William L. Harrison.)

in subsequent years reduced to Class C, that the defendant could not haul that after it had been turned to Class C, simply because it was Class A when the regulations were made? Is that what you wish to say?

Mr. Collett: Objection, if the Court please. I think that is highly argumentative.

The Court: You may answer.

A. Well, my answer to that question is that since the [123] Commission has definitely interpreted the definition of Class A, B and C explosives, that regardless of whether any scientific changes or chemical changes may take place, that they have not receded from their determination that Class A is a dangerous explosive and Class B is a less dangerous explosive. Now yesterday maybe a detonating fuse may have been classified as A. Tomorrow they may be classified a C. I do not know. All I know is that the Commission has not receded from their classification of A and B and C explosives.

Q. It would be, as I understand, from the statement that you have made, this: If, to use the example you have given here, of the detonating fuses, —if tomorrow it should be moved from A to C, it would be your understanding that the defendant could then haul it?

A. That is correct, and I could very aptly explain that in the transportation from Herlong out of there, there were many, many, many explosives which this defendant transported which fell in

(Testimony of William L. Harrison.)

Class C, and they are not included in this information.

Q. As a matter of fact, a substantial number of all fell in Class C, did they not, sir?

A. That is correct.

The Court: They are not charged here.

Mr. Russell: That is correct. I was simply bringing the question out to show the pattern of transportation. [124]

Mr. Russell: Q. Now, sir, you mentioned that the Commission had definitely decided that issue. Can you point to me, as an attorney for the Commission, one single solitary case decided since the present regulations were placed in force on May 9th, 1950, in which the Commission has said that Class A means dangerous, Class B means less dangerous, Class C means relatively safe, or has characterized them in any other way?

Mr. Collett: If the Court please, I am going to object. It seems to me that this develops itself down to some sort of a distinction between what is a maximum hazard as opposed to what is dangerous. The particular wording that counsel doesn't mention — he keeps referring to dangerous explosives—is that in the charge that was made, that refers to it as maximum hazard. And for the purpose of clarification——

The Court: I don't know—what comes of that phraseology, dangerous?

Mr. Russell: What did you say?

The Court: Phraseology.

(Testimony of William L. Harrison.)

Mr. Russell: I have been restricting it to dangerous, less dangerous and so forth, because it is the fact, I believe, that the words in the Tariff No. 6 said Class A, dangerous, maximum; "maximum hazards," words something to that effect. Then Class B, it said, "Less dangerous, flammable hazards." The effect of the change was to leave the document [125] saying, "Class A, maximum hazard." The only change was to pull out of the regulation the words "dangerous, less dangerous and——"

The Witness: "Relatively safe."

Mr. Russell: And "relatively safe." So that perhaps I didn't mean to—I didn't want to mislead the witness; I thought he and I were both familiar with the fact that that language had not been changed. I was talking only about that change.

Mr. Collett: Well, if the Court please, as long as counsel is relying upon his memory, it seems to me that perhaps at this time it might be good to just take the two provisions, 73.51, in the case of——

(Conversation between Messrs. Collett and Russell out of hearing of the Reporter.)

Mr. Collett: Now in the first instance, Class A says, "Dangerous explosives, detonating or otherwise of maximum hazard."

The Court: Otherwise what?

Mr. Collett: "or otherwise of maximum hazard." In the next expression it says, "Class A explosives. Detonating or otherwise of maximum hazard." The two words, "Dangerous explosives" were deleted.

In the case of Class B, the first is, "Less danger-

(Testimony of William L. Harrison.)

ous explosives, inflammable hazard." The change, "Class B [126] explosives, flammable hazard." The words, "Less dangerous," those two words were deleted.

In the case of Class C, the first is, "Relatively safe explosives, minimum hazard." And then, "Class C explosives, minimum hazard." The term, "relatively safe explosives", was deleted.

Mr. Russell: In order that we might have the record clear, let me ask this question.

Q. You so understood that that was the compartive language as in my questions with respect to change, did you not, Mr. Harrison?

A. That is correct, yes.

Mr. Russell: I thought we had a question pending, did we not, Mr. Reporter?

The Witness: You had a question; I can answer that question now.

Mr. Russell: May we have the question read? To be quite frank, I have forgotten precisely how it went.

The Witness: He asked me if, since the adjudication in the Strickland case, the Commission under this new wordage, if they had been called upon to again, to interpret "dangerous explosives."

Mr. Russell: You recall it to my mind now. I don't believe that was exactly my question.

The Court: Well, we will get his answer now.

Mr. Russell: The question is not exactly—he doesn't have my question exactly as it was put, Your Honor.

(Testimony of William L. Harrison.)

Mr. Russell: Q. My question did not relate to the Strickland case, but to a decision subsequent to May 3rd, 1950, the date upon which this changing language in the regulations became effective.

A. I will answer that this way. I have searched and have found no decisions subsequent to the Strickland case.

Q. That's right. Now, sir——

A. That case was decided in 1949.

The Court: '49.

Mr. Russell: Q. And to clarify the matter for the Court, the Commission in that case gave some indication that it had never previously undertaken formally to consider the question of what was meant by "dangerous explosives" in certificates, is that correct, sir?

A. It didn't state it in that term. I think the Commission equivocated slightly, but it said that, "We have defined it, but in case anybody doesn't understand our definition, here it is again." Now that's the way it was.

Q. Now in that decision, as I believe you will recall, they said, did they not, that when they used the term "dangerous" they are including the words "dangerous and less dangerous" as described in the regulation? Wasn't that true, sir?

A. They didn't put it in those words. They said that, [128] "we have defined dangerous explosives——"

The Court: Aside from other administrative

(Testimony of William L. Harrison.)

bodies, am I bound by the Commission's interpretation here?

Mr. Russell: Yes, Your Honor. I believe that goes to the very core of the defense of my case. I believe that we have here a technical word used in a technical sense.

The Court: Yes?

Mr. Russell: And under the—I will argue it at greater length later so the Court may see it. Under the rule first established in the case commonly known as the Abilene case and followed in many, many cases since then,——

The Court: How far is the Court bound by an administrative body?

Mr. Russell: The rule that I have in mind is what we call the primary jurisdiction doctrine. It presumes that both the Court and the Commission, or the other administrative body, have the power to go forward with this particular inquiry.

The Court: Yes?

Mr. Russell: As I read the cases, if the word which is the subject of the litigation is one which has been given a special or technical meaning as distinguished from its common meaning, the interpretation of what that word means becomes an interpretation of fact as distinguished from an interpretation of law. [129]

The Court: Yes?

Mr. Russell: And that until such time as a definite interpretation has been placed upon the word by the administrative agency, simply for the

(Testimony of William L. Harrison.)

purposes of uniformity and performing uniformly —since the matter may come up anywhere in the courts——

The Court: By determination of the court?

Mr. Russell: I say the question may come up in many, many courts. The primary jurisdiction doctrine says that the court will not go forward with the proceeding, but will leave that interpretation to the Commission. I think the Court can recognize the problem. Perhaps there is an example here. The word "dangerous explosives"; if the Court here were to say, for example, that dangerous explosives in the mind of the court meant A, B and C,——

The Court: Well, I am so limited in these explosives, I am frank to tell you that I think—of course I am bound by the letter of the law and the regulations, but suppose a witness is called here and would break down these various shipments and their contents and what they are; would that enter into this case?

Mr. Russell: I say, sir, that it would only secondarily. Only if the court had preliminarily decided that it was going to take the responsibility for fixing the meaning of the words "dangerous explosives." In other words, I pointed out——[130]

The Court: To my mind, all explosives are dangerous.

Mr. Russell: That is exactly what I have in mind. But we see here, you recall,——

The Court: I say those things; I am frank about

(Testimony of William L. Harrison.)

it. Now I could be entirely mistaken, and if I am, you may have full opportunity to correct me.

Mr. Russell: Well, if you will recall—I might mention—you made some comment similarly yesterday, and I immediately followed—we were discussing also this Strickland case by questions of Mr. Harrison in which he pointed out that all explosives under that decision upon which they rely were not considered dangerous within the meaning of certificates.

The Court: I understand.

Mr. Russell: That goes right to the core of my position. I say then we must find out in this technical language of certificates, if you will, what is a dangerous explosive.

The Court: My thought is, why not take a step further, then, and they could easily produce a witness indicating and breaking down what these shipments were, whether or not they were dangerous. Is that possible?

The Witness: Well, Your Honor, each of the shipments included in the counts which are before the Court, I thought it was in the record that they are either classified under this regulation A or B, and from the plaintiff's point of [131] view, those are classified as dangerous explosives. Now that is my understanding.

Mr. Russell: I say perhaps I have not as yet made my position clear.

The Court: Go ahead. I think you are more familiar with this field than I am. That is the

(Testimony of William L. Harrison.)

reason I have been so patient here. I have to be advised. But since the regulations themselves provide that A and B are dangerous, and we are quibbling about that——

Mr. Russell: That is exactly my point, Your Honor. The regulations at one time did say that A was dangerous, it said that B was dangerous.

The Court: Yes, but they are both dangerous and they are still in the regulations.

Mr. Russell: But for some reason, and we must presume the Commission had a purpose for doing so, it went through those sections in the early part of 1950 and changed the definition, doing just one thing, taking out the words "dangerous," "less dangerous," and "relatively safe."

I might cite an example to point out why I think it is significant. Let's suppose that a carrier interested in solving this problem has the words "dangerous explosives" in its certificate. It goes to the Strickland case and it says there: "Dangerous explosives when intended to mean explosives dangerous or less dangerous, and refers to the [132] regulations using those words obviously as words of technical meaning as they are used in that regulation.

Then the carrier at any time after May 9th turns to the regulations for the answer to his problem.

As Mr. Harrison admitted yesterday on the stand, he can search the document from one end to the other and find no where in it the words "dangerous," "less dangerous," or "relatively safe."

(Testimony of William L. Harrison.)

The Witness: That is not entirely correct. The word "dangerous" is used lots of times in there.

Mr. Russell: Q. But in other connections—I mean, in the definition sections. A. Yes.

Q. Perhaps I am overstating the proposition.

A. Yes.

Mr. Russell: My point, to answer the question which the Court first asked me, in this inquiry is that that puts us in the position where a possibility of doubt exists that perhaps the Commission meant some change in its technical definition and that therefore we have an uncertainty. This Court could feel free to say, taking out those words, there has been a change. The Court might say: I feel all explosives are dangerous; therefore I am going to say in this proceeding that A, B and C are dangerous explosives in the transportation——

The Court: C? The charge here is A and B.

Mr. Russell: If you recall, I raised some question and opposed—. There was a C included in Count 11 and I raised some objection to its dismissal.

The Court: Well, that is not before the Court. It is dismissed.

Mr. Russell: I appreciate that, sir. But that poses the issue which is here.

The Court: I understand. I want to give you full opportunity on the theory that you are trying to get a result on in this case. I usually do that because of my limited familiarity with these mat-

(Testimony of William L. Harrison.)

ters, and I take it you specialize in this type of litigation.

Mr. Russell: I try to, sir.

The Court: Where are you located?

Mr. Russell: In Los Angeles, sir.

The Court: You specialize in rates?

Mr. Russell: Not in rates. Particularly transportation of motor carrier—by motor carriers—that is the principal work that we do, sir, my partner and I.

The Court: I thought that your partner was your brother. Go on.

Mr. Russell: Just as long as we have partially discussed this, I would like the privilege of mentioning just one more phase of this matter before I return to the interrogation. [134]

The Court suggested the possibility of calling someone who was familiar with explosives.

The Court: Since we have been discussing it, it is my present thought to give you an opportunity to change my mind. These allegations are covered in A and B——

Mr. Russell: That is right.

The Court: ——and as far as we have gone, I freely confess to you, as a judicious judge is always brought to do, that under the classification here these are dangerous explosives.

Mr. Russell: I appreciate, sir, the reflection of the Court.

The Court: But because I am frank enough to state that, that does not preclude you from getting

(Testimony of William L. Harrison.)

the proper record here that you are trying to develop.

Mr. Russell: As I say, my comment that I was making with respect to what these things are is that it is really our position here that there is sufficient confusion, let me put it that way, so that the reasonable minds of judges might differ on that subject.

The Court: I trust I do have a reasonable mind.

Mr. Russell: And that the matter for the sake of uniformity should not be made the basis of a criminal proceeding until such time as the administrative agency primarily charged has cleared the matter up.

That is the nub of it, and I have certain cases to cite.

Mr. Collett: If the Court pleases, for clarification purposes further, presently there are 12 counts from the description of the type of explosion would come within the category A, and 3 under category B. Originally there were 14A, 5B and 1C.

The Court: If we are in doubt about B, we will——

Mr. Collett: Whether or not a B became subsequently a C is, I would say, wholly immaterial, because if it became a C, it is not here, we wouldn't have it before us. What is A and B is, of course, and I believe the record will show and the evidence will show, that A has been A continuously and the B's have been B's continuously, and that there has not been any change as far as the Commission is

(Testimony of William L. Harrison.)

concerned, which says that a Class A or Class B is a C, so that if that had been true we would probably have moved to dismiss any of those matters as not being properly before this Court.

Mr. Russell: I think counsel was directing those to the specific items that are here involved, but I would seriously challenge that A's have not been changed to B's, and B's to C's, and that is exactly what I have in mind.

In other words, it is conceivably possible that at the time the information was drawn and the last Federal Register was made available one of these items was a B and as of the [136] date we now speak, today, one of those items might be a C.

The Court: Maybe the specialist will help us on that.

Mr. Russell: I had intended to direct some questions along that line. So perhaps this is a good time to go to it.

Q. I hand you, Mr. Harrison, Exhibit 7 describing, so far as the information is concerned, six boxes of fireworks special weighing three hundred pounds. You might hold that before you (handing to witness).

So far as the record reflects, that shipment constituted, did it not, a full truck of explosives of one type or another? A. That is correct.

The Court: Charged under what count?

Mr. Russell: This is under Count 5.

Q. And it is true, is it not, that all except the

(Testimony of William L. Harrison.)

300 pounds of the some 30,000 pounds of that shipment were small arms ammunition?

A. That is correct. I am taking the words of the document.

Q. Of the document. A. Yes.

Q. Yes. As I understand it, it is the words of the document that you relied on principally all the way through. A. That is correct.

Q. And small arms ammunition in Exhibits 23 and 24 are, generally speaking, Class C ammunition, are they not?

A. That is right. They are classified as Class C. [137]

Q. So that we have in this particular shipment then a very small quantity of Class B and a relatively large quantity of Class C in this particular truck? A. That is correct.

Q. Does the document indicate whether the vehicle was sealed, on its face?

A. No, I have never examined these documents to determine whether they showed on their face whether the vehicle was sealed.

But my understanding is that all of the vehicles were sealed by the Army.

Q. That was your understanding?

A. That is correct.

Q. I would like to call your attention to Exhibit 24, Item 64, which appears on page 45. You find it refers to fireworks? A. That is right.

Q. Reading that item, and you may refer in connection with my question to the classification——

(Testimony of William L. Harrison.)

Mr. Collett: What's the number of that section?

Mr. Russell: Item 64 of No. 6, the superseded rules.

(Discussion between counsel.)

Mr. Russell: Q. With respect to that and to the classification that you have indicated previously you are more familiar with, it does appear, does it not, sir, that [138] fireworks of all classes, listing many different items by the name, designated in that document as being Class B?

A. Class B, less dangerous explosives, that's right.

Q. And Item 64, to which I have referred you, lists many specific things——

A. Yes, it gives examples.

Q. Now I would like to call your attention to Item No. 73.88(d). It is in the other tariff, the one that is before the Court.

Might the witness——

(Document handed to witness.)

A. Seventy-three—what was that?

Q. Point 88(d). It is on page 43.

A. Page 43.

Q. According to the copy I saw. 73.88(d). You find the classification designated as fireworks special, do you not, sir?

A. What sub-paragraph is that, please?

Q. I have point 88, sub-paragraph (d).

A. Yes, that is right.

Q. And that in turn lists a variety of different

(Testimony of William L. Harrison.)

specific commodities, which are deemed to fall within that category—right, sir? Before you make the comparison, would you also look at item No. 73.100(r). You have that? A. Yes, sir. [139]

Q. That also describes a group of fireworks which are listed as "common," does it not?

A. Well, under Class B it refers to fireworks special.

Q. There. But in another group there is a list of another group which are "common"?

A. They make the distinction between "special" and "common."

Q. And common. And the "common" are classed as Class C explosives, are they not?

A. That's right.

Q. Now going back to Exhibit 24——

The Court: Just a moment—wait a minute. How do you classify these B then?

A. From the freight bill, it states on the face of it, "fireworks special."

The Court: Go ahead.

Mr. Russell: Q. Going back to Exhibit 6, no such classification was made under the former rules dividing fireworks into two different groups, was there?

A. That I can't answer without——

Q. Would you look at it? You are familiar with the classification?

A. You mean in Tariff No. 6?

Q. In Tariff No. 6, yes.

(Testimony of William L. Harrison.)

A. Well, I can't say—say that I know they have amended this. [140]

The Court: If you are familiar with it, direct his attention to it.

Mr. Russell: I have directed his attention to what I think are the only references, to the classification index that he said he was more familiar with yesterday, and he can compare that.

A. The only one I am familiar with is under Section 72, where they classify A, B and C, and they definitely set out the items.

Q. Would you look in Exhibit 24, in the portion with which you are familiar, and tell me how many different kinds of fireworks you find shown there?

A. There are several in there. That is true.

Mr. Collett: If the Court please——

The Court: There is a definite charge here and the allegation of the type.

Mr. Russell: That is correct, sir, and I will be frank to state, the purpose of my inquiry is to show through this witness that there is a possibility because it involves a matter of judgment of someone at the time those words were used, that it might actually have been something else in the truck.

Mr. Collett: Well, if the Court please, I object to this line of questioning, in that term "special fireworks" was the term used by the defendant himself to [141] define this particular commodity. If there was something else, why did he not define it as something else? He specially puts it in that category.

(Testimony of William L. Harrison.)

They purport to assume to transport a Class B explosive and they define it themselves.

Mr. Russell: Counsel is making a statement there that he has not established in this record and that, I respectfully submit, he cannot establish in this record.

Because, as I think I can develop from this or other witnesses, I am sure, because these vehicles are sealed, the defendant must simply take the words that somebody else has used, to characterize the products in his truck for putting on his documents in order that that shipment may move forward to its ultimate destination.

That was the essence of my objection to the admissibility of these documents, that we are charging the defendant in this case with words which are not his own and which the defendant has no possible way of checking the accuracy.

Mr. Collett: If the Court please, if we might assume that it is impossible to bring any particular one of these trailers or semi-trailers and open the contents as to what was in there, this defendant did identify the contents insofar as they were advised of those contents, and in the face of an operating authority which says that they do not have authority to do certain things, they assumed the responsibility [142] to transport forward what they have identified without themselves doing anything further about it.

Their own statement in itself as to what the con-

(Testimony of William L. Harrison.)

tents were is sufficient to have indicated to them what they were doing.

Mr. Russell: Counsel, I think I can answer counsel's statement, by saying that I hand him this article, which I hold in my hand, and tell him that it holds percussion caps, with a receipt that it holds percussion caps, but it is sealed and he it not to open it. And he as a matter of necessity going only to a point six blocks from here maybe called upon to give it to someone else. So he makes a document, and upon my representation that there are percussion caps in here, he says, for his receipt, one package of percussion caps. I am certain that Counsel would not want to be hailed before this Court under such circumstances, on the basis of the statement contained in his receipt that he had been unlawfully transporting percussion caps. And that is exactly what they are attempting to do with the defendant here.

My purpose of the inquiry, in order to get back to the objection, was to develop from this witness, if he knows the facts, that very point, that this is an example of an item included in the information where changes were made in 1950, wherein it is conceivable and possible for certain reasons a [143] person might, in the interests of precaution in making up that bill, resolve a doubt in his own mind that they were "special" as distinguished from "common," when he must distinguish from a whole list of specific products.

The Court: Who?

(Testimony of William L. Harrison.)

Mr. Russell: Whoever makes up the specific designation.

The Court: Who makes these? Whoever ships them?

A. The Army Ordnance Depot in Herlong, and the transportation officer there. As I stated yesterday, I did not have the bills of lading prepared by the Army Depot transportation officer. The reason I did not have all of those is because they were forwarded for payment. But there are a couple there, two, I think. The reason that I have those, they were extra copies because there was a beyond movement.

But my whole testimony, if I may put it that way, is predicated upon the fact that on each of those bills of lading that the exact wordage is transcribed from the bill of lading by the defendant on to their own freight bills, that on each bill of lading it has "explosives" stamped right on the face of it.

Mr. Russell: Q. Now you are offering a statement. I want to clarify it before you go too far.

I understood you to tell me yesterday on cross-examination that your inspection of these various items was restricted to the examination of the freight bills, the [144] trip report of the driver, and your conversations with Mr. Gottstein. Was I in error on that, sir?

A. Well, to the extent that on two of the exhibits there are bills of lading attached, and I think Mr. Collett interrogated me yesterday on that.

The Court: On the forwarding transaction?

(Testimony of William L. Harrison.)

The Witness: That's right, on the wordage used on the bill of lading and the wordage used on the freight bill. I think you will find that in those two——

Mr. Russell: Q. And on those two?

A. That's right.

Q. With that exception, my characterization, that I have just given you, is basically correct, is it not? A. Yes.

The Court: Those are the only ones you have got, though?

A. Yes, that's right.

Mr. Russell: Q. But you are familiar, are you not, sir, with the fact that from these records it indicates that in every instance of every count in it for the freight which is involved, came to the defendant from some other motor carrier?

A. That is correct. On a bill of lading—on a bill of lading which described from the shipper the exact content of the shipment, together with a stamp that this shipment is [145] classified, packed and is shipped according to the regulations of the Interstate Commerce Commission as contained in this Tariff (indicating).

Q. In answering my question that way, you are presuming because you did not look at the shipping document—you just told me so, isn't that true? Mr. Harrison?

A. I am referring only to those bills of lading which I saw.

Q. The two.

(Testimony of William L. Harrison.)

A. And their—the two of them—and naturally I drew a conclusion they were all the same. But on the ones that I saw that is what was indicated.

Q. All right now. But we do have the fact that this defendant received in each instance a sealed vehicle from some other private motor carrier, right? A. That's correct. That's correct.

Q. And we do have also the fact, do we not, Mr. Harrison, that that carrier in turn received the vehicle sealed under general practice from the Government.

A. That is correct, with a bill of lading. That is, the functions that I don't want the Court to lose track of, that whenever that vehicle is loaded, there is a bill of lading executed, right there.

Q. Now we are getting back to the point of my interrogation.

The Court: You mean to indicate that was a notice to whoever—— [146]

A. Yes, sir, that's right.

Mr. Russell: Q. Now when we get back to that point, Mr. Harrison, we are getting to the point of my inquiry on fireworks of a few moments ago. At some point in the Government installation must take, who knows what the product is, whether it is a Roman candle or Verry pistol or whatever else it may be, and make a decision in his mind as to whether or not that particular commodity is to be classed as described in that bill of lading as "fireworks special" or "firework common," must he not?

(Testimony of William L. Harrison.)

A. Well, I will answer that this way, if this was a manufacturing establishment that was making fireworks for all different types of use, it would be incumbent upon the shipping clerk to have a pretty good understanding of what he was shipping.

But here it was fireworks special from a military establishment to a military establishment. It is not the manufacturer.

Q. But you do have someone in the military organization——

A. They could make an error.

Q. That's right.

A. They could make an error.

Q. Now I call your attention, and I pick "fireworks special" as an example, because I think it illustrates the point. Look at 73.100, and to the specific commodity. You [147] will find in there——

A. Which Tariff?

The Court: Goes into Class C?

Mr. Russell: Yes.

Q. You will find in there, will you not, sir, that some of the items are listed as Class C only because of the volume of the explosives in their internal content? A. I think that is correct.

Q. So that a given article might be one or the other, depending on how much explosive it had inside?

Mr. Collett: I object, if the Court please, this is purely argumentative.

The Court: Not altogether. I will allow it.

A. I think you are basically correct, in that that

(Testimony of William L. Harrison.)

goes to the whole essence of the issue here, that if the thing is just going to pop when it explodes, that is less dangerous or relatively safe; if it is going to boom and kill somebody, that's dangerous, and the degrees in between. That is the answer.

Mr. Russell: Q. It is entirely possible that faced with a doubt as to whether or not a given article had in it quantity A or quantity B explosive, that a representative of the Government in deciding which way he should characterize it on the bill of lading, in the interests of safety might say: I cannot ship it as a C if it has more than so much, [148] but I can ship it as a B even though it has less. Therefore I will classify it as "fireworks special"; is that not possible?

Mr. Collett: Object, if the Court please; that is speculative. We have here——

The Court: The possibilities don't spell out very much for us.

Mr. Russell: They spell out, if the Court please, I think not very much in the individual case, I will concede. But I do think they spell out the basic seriousness of charging a person criminally when there are other remedies available for being guilty of using certain words to mean certain things or as an understanding as a knowledge of certain things when it is apparent that anyone of a number of people back down the line for a considerable period of time may have done something, as a result of which the defendant must pay a penalty on the basis of things over which he has no control

(Testimony of William L. Harrison.)

since he cannot take the goods and look at them himself.

The Court: The witness on the stand says he has his notice by that bill of lading.

Mr. Russell: That is the point I was seeking to develop if the Court please, by the question that the bill of lading in turn describes a generic phrase, and that somebody must decide whether a particular kind of a Roman candle [149] is a fireworks special or a fireworks common, somebody over whom the defendant has no control.

The Witness: If I may inject myself in here, it does not describe it in a generic term. Each one of those shipments is described as classified A, B or C, and that is not a generic term, ——

Mr. Russell: You cannot tell, Mr. Harrison——

The Witness: ——in the very wordage of this classification.

The Court: It is 12 o'clock. Can't you hear the bells ringing?

(Thereupon a recess was taken to the hour of 2 o'clock p.m. this date.) [150]

Afternoon Session, Wednesday, April 16, 1952 at 2:10 o'clock p.m.

The Court: You may proceed, Gentlemen.

Cross-Examination—(resumed)

Mr. Russell: Q. Mr. Harrison, you will recall just prior to the noon recess I was addressing certain questions to you with respect to the particular item fireworks special, which I had selected as

(Testimony of William L. Harrison.)

a possible example. Would it not be correct, Sir, under the regulations as described in Exhibit 23, that fireworks special as the word is used there is a generic term in its sense, in that it is used to cover a number of different items as distinguished from some specific physical product that we might take in our hands, as being the only possible thing that could be described as a fireworks special?

Mr. Collett: If the Court please, I object that the term speaks for itself. This is a matter that——

The Court: That will be a matter for this Court to make a determination on, not this witness.

Mr. Russell: Very well, if the Court please.

Mr. Russell: Q. Earlier in the examination this morning I asked you certain questions, if you will recall, with respect to the statement made near the end of the afternoon session on page 105 and 106 of the transcript with respect to the varying language in the orders and varying dates of certificates. Do you recall generally that subject of inquiry, without—I am not intending— [151] do you know to what I refer?

A. No, I do not, exactly. You say varying language in certificates and orders. I don't recall——

Q. Well, let me put the question in this way. Do you recall the statement that you made yesterday afternoon to which I addressed your attention this morning specifically by referring you to the transcript? Would you like to have it again?

A. Well, I believe I had better, because I— (examining transcript). Yes, now I recall.

(Testimony of William L. Harrison.)

Q. I want just to be sure that I understood your statement with respect to that amplification this morning. Did I understand it to be your statement in clarification this morning that the meaning of the words "dangerous explosive" might vary with changes in the regulations from time to time, depending upon where a particular item was classified?

Mr. Collett: Well, if the Court please, I think again I will object on the grounds that we have been over this matter rather fully and I believe that for the Court to determine whether or not the matter that had been presented and the evidence before this Court, that comes within the provisions found within the regulations, and the matter that has been shown. It is not for this witness to determine or define the terms.

The Court: I have allowed the widest latitude here. [152] I think we are making no headway.

Mr. Russell: If the Court please,——

The Court: I would allow this question to be answered, but keep that in mind. If you are able to answer, you may answer.

A. Well, my only answer can be that the Commission, I think, under the act, the Federal statute, is authorized to prescribe these regulations, and that is, it has prescribed regulations pursuant to, and it no doubt could make some changes if it felt it necessary.

Mr. Russell: I hesitate to inquire further in view of the Court's comments. I would like to state

(Testimony of William L. Harrison.)

simply this, that one of my purposes of interrogation of this man, who undertakes to have some familiarity with the subject as to developing——

The Court: He can't speak for the Commission.

Mr. Russell: But I do wish to develop that he has some expert background in the field.

The Court: That is the reason I have allowed this latitude.

Mr. Russell: And my purpose, and I wish to explain it before I undertake to close any other questions along the line, in view of the Court's statement—is simply to develop in this record the very fact that this meaning of this term is something subject to variation, something [153] subject to technical description, for the purpose of establishing for the Court that it is one of those things, one of those words, contrary to Counsel's statement, is something which it is not for the courts to decide but for the Commission to decide.

The Court: Give me an example of what you have in mind.

Mr. Russell: I have in mind this situation. It is a little difficult for me to think really of an example that comes closer than the very matter——

The Court: That is the reason I am having some difficulty following you.

Mr. Russell: ——that we have here. Let us take this example, though it is not exactly the same situation in its fact element. Certain words are used in a tariff describing a commodity, which are used not in the lay sense but used in a technical

(Testimony of William L. Harrison.)

sense to describe a particular kind of article. For transportation purposes it has different characteristics, or certain characteristics can cause it to bear a certain rate. With certain other characteristics, a very similar article may carry a different rate. That tariff is filed and approved by the Commission, and as such, as the Court is well aware, it has certain stature as a matter of law. Then a proceeding arises, perhaps as a criminal complaint against the railroad for having described this article as item A when there is a description of item B [154] of a higher rate which would carry a higher rate, that the Commission says should be the rate charged. Since the word is not used in its common or lay sense, and within the meaning of the common understanding, either of the words might fittingly describe the particular product. Carrying my example further, I might say that a given article, let's say it was a piece of steel with certain work done upon it, might in the lay sense be used to mean either one of these two things that are described in this regulation document. The matter comes before the Court, the technical word is involved, the meaning—whether the word is technical in its sense, or its lay sense—is involved. It is a matter merely of construction of the meaning of an ordinary lay word, I think, as the Court well recognizes, that is a conclusion of law which the Court makes; but the Court, when it finds that the word is technical or unusual or specially used, must make a preliminary finding that it is, as a matter of fact,

(Testimony of William L. Harrison.)

this word which ordinarily may mean something else, but which has in this particular case a certain meaning.

Now the obvious result of that is, as I indicated in discussing a related matter this morning, that one Court might say this technical word means, as a matter of fact, certain things; and then proceed to say that the particular product that I now have before me is being classified under that definition, fits that definition as being item A. [155] Yet another Court, presented with exactly the same facts, could reasonably come to a conclusion that it is a matter which should have been classified the other way. It is a situation which cannot be solved on appeal, because even the opinion of the Supreme Court would be a determination of a matter of fact as to what this word embraces when used in its technical sense. So that to solve the problem and to avoid hopelessly conflicting determinations, the Courts as a matter of policy in interpreting laws, where both the Court and the Commission, or the Court and the other administrative body have some to speech, says as a matter of policy, "We will not undertake to pass upon the meaning of that word as a matter of fact, but will leave that to the Commission."

Now it is my purpose in directing these questions to this witness, as a man with some experience in the field, to show to the Court that this word "dangerous explosive," as it is used in the certificates, has a meaning technical in its sense, as distin-

(Testimony of William L. Harrison.)

guished from its lay or common meaning—and that this inquiry that I am now conducting is to show that even then it is a changing meaning, that the Commission can change its terms.

The Court: That goes back to what I have indicated this morning in relation to the administrative body: how far this Court is bound by their interpretation. [156]

Mr. Russell: Well, I respectfully submit to the Court that the question I seek to pose and the problem I seek to raise is not exactly that problem, but that it is the problem of the policy of this Court, where it is called upon to interpret words that lie by virtue of legislative enactments of the Congress in a field where an expert body has been set up—even though the Court has within its province and its power to find as a fact that this word means certain things——

The Court: Now let me inquire. You have a theory of this case and I think I know what you are trying to establish. I want to give you a record on this.

Mr. Russell: I appreciate that.

The Court: So that if I disagree with you, you will have an opportunity to have a further determination on it. Doesn't this record already disclose anything that you wish to prove?

Mr. Russell: Well, the reason I went back to this subject at this moment was that this morning we were deflected by a specific question or an objection, and I began on another tack before I had

(Testimony of William L. Harrison.)

quite concluded my inquiry of the witness on this particular field. I was hoping just to wind that up by my inquiry.

The Court: Well, if you want to wind it up, I will give you an opportunity so that you won't go back to Los [157] Angeles disappointed. Proceed.

Mr. Russell: Well, perhaps I could handle it in this fashion.

Mr. Russell: Q. I call your attention, Mr. Harrison, to Exhibit Number 1 in this proceeding, which undertakes to describe the certificate issued to this defendant, and call your attention to the fact that the date of that order is the same date as the order of the Commission amending the regulations governing the transportation of explosives, and ask you whether or not from your understanding of the manner in which these matters are handled, that that coincidence of date might have any significance.

The Court: If you know.

A. I don't know that it has any significance. All I do know is that this is what we call a consolidated certificate, that this certificate has been rewritten. In other words, the authority now owned by West Coast Fast Freight was a purchased authority in the beginning. They have added to their authority by other purchases, and they have secured extensions of operating rights. In those instances, as a matter of convenience instead of having to have numerous authorities, the Commission will issue a consolidated certificate, and the mere fact

(Testimony of William L. Harrison.)

that it is dated on this date, —I do not know the significance of that point. [158]

Q. But I believe you will agree with me, will you not, Sir, that the words as they are used in there need not reflect back to the date that the original person acquired the right, but that they have their meaning on the basis of current regulations of the Commission at all times? A. No.

Mr. Collett: Well, if the Court please, I will object to that question——

The Court : The answer is no. Allow the witness to express himself.

Mr. Russell: Q. Did I understand you, Sir——

A. Yes, I can explain that. The answer is, if you buy a pig on a poke, you buy a pig in a poke. If you bought carrier A and he had certain rights, you get just those rights and that's all.

Q. Well now, I believe that if I understand you correctly, that I am eliciting different responses than I did this morning. Let's suppose, to pose the question, that the right which covers the authority to transport property between Oakland and San Francisco was originally secured as a grandfather right by virtue of operations conducted on June 1, 1935; that it then passed to the defendant by transfer, say, in 1947, without any change in the language; that the transportation here was performed in 1950. Now what regulations of the Commission do I understand you to say [159] would be the regulations that the Court should look to to find the meaning of the term in this proceeding? Would

(Testimony of William L. Harrison.)

they be the regulations in effect on June 1, 1935, when the right originally came into being, or 1947, when the right was transferred, or today?

Mr. Collett: If the Court please, I am objecting to that question as being compound, complex, hypothetical, and speculative.

The Court: I realize it is, but in order to get through, why, I will allow the witness to answer.

Mr. Collett: If the witness understands what the question is, maybe he can answer it.

Mr. Russell: I might state——

A. I understand, I think, if I may answer. The certificate is not changed; that is, the wording of the certificate is not changed. In other words, if the authority which, as I understand, Colletti Fast Freight was the original owner of this certificate, and as far as I know, that is the wordage exactly of the certificate issued to Colletti Fast Freight. It is true that in transfers, and as time progresses, and there have been changes and modifications and transportation problems. There is an administrative procedure which takes considerable time of the Commission, and that is this, that if, when one carrier buys a carrier's rights, and they think they got one thing and it turn out [160] that they got another, they apply to the Commission for an interpretation of the certificate, and in that manner the certificate could be reworded upon order of the Commission to fit the demands or to fit the operating intent of the carrier as shown by a public convenience and necessity.

Mr. Russell: Q. My question was, Sir, assum-

(Testimony of William L. Harrison.)

ing that the words actually in the document before you stayed the same, dangerous explosives, it is still true that the specific articles may change from time to time, and that by virtue of that change in the regulations, a given product, such as, fireworks common that we were discussing this morning—might in 1947 be an article which, under your classification, would be a dangerous explosive then and today no longer be such an item? Isn't that your interpretation of the regulations?

Mr. Collett: If the Court please,——

The Court: You are going afield, I fear.

Mr. Russell: Very well, I won't press the matter unduly.

A. Well, I can answer that this way. This certificate says dangerous explosives, and there is a restriction against it; and as I understand it your predecessor in interest secured a grandfather application. That is, a grandfather right that had been in existence. Assuming, then, that his rights were established upon the regulations which were in [161] effect in 1935, the mere fact here in Exhibit 2 that the West Coast Fast Freight, who was a defendant here, uses the same terms and the same language in their application for an extension, when they have applied for dangerous explosives—so my only answer is that dangerous explosives are the same now as they were back in 1935.

Mr. Russell: Q. In other words, if I understand you, Sir, it is necessary for the defendant, in

(Testimony of William L. Harrison.)
order to interpret its certificate to have available——

Mr. Collett: If the Court please, if this is the question, I would like it to be a question.

Mr. Russell: Well, I am trying to pose it as such.

The Court: What's that?

Mr. Russell: I said I was trying to pose it as such.

The Court: Well, it now becomes necessary to become judicial. Proceed, Gentlemen. I will rule.

Mr. Russell: My question, Sir, was, if I understand you correctly, that it is necessary for the defendant in order to know what particular products it may transport and which it may not transport, which are of explosive character—it is necessary for the defendant not only to look at the current regulations of the Commission, but to the regulations which may have been in force at the date that authority was created, either by a grant to them or to their predecessor? Is that my understanding? [162]

Mr. Collett: I object, if the Court please, and that is calling for an opinion and conclusion of this witness, and a matter that is for this Court to determine in the light of the regulations and the evidence before the Court—whether or not there are changes remaining here.

The Court: The objection will be sustained.

Mr. Russell: Q. Mr. Harrison, under the document which you have before you, Exhibit Number

(Testimony of William L. Harrison.)

1, it is correct, is it not, that the defandant has the right to transport dangerous explosives between certain of the points that it serves?

Mr. Collett: Well, I am going to object, if the Court please; the document speaks for itself.

The Court: Well, the points that have been served have been indicated here. You are assuming a fact not in evidence.

Mr. Russell: Very well, Sir.

Mr. Russell: Q. Certain of the shipments which are involved in this proceeding involve the transportation over the highway of explosives, according to the records, between the cities of Tacoma and Seattle, do they not? Is that not correct?

A. Yes, I think there were probably two shipments that went onto Seattle and then to a beyond point.

The Court: Forwarded?]163]

The Witness: That is right.

Mr. Russell: Q. And it is correct, is it not, Mr. Harrison, that portions of the operating authority described in Exhibit 1 will permit, so far as physical operation over the highway is concerned, the defendant to operate its trucks between Tacoma and Seattle in the transportation of dangerous explosives without being in violation in any way of its certificate?

A. I think that is right. The defendant does have some authority, and that is the main reason why it participates in this explosive tariff.

Mr. Russell: I think that's all the questions I have, Mr. Harrison. Thank you very much.

(Testimony of William L. Harrison.)

Redirect Examination

Mr. Collett: Q. And Mr. Harrison, that term with regards to that particular authority is "dangerous explosives," is it not?

A. Well, it is the authority is unrestricted. It doesn't say, "You may transport dangerous explosives" affirmatively; it says "General commodities, with no restrictions." That means the door is open.

The Court: Is that all from this witness? [164]

The Court: That is all from this witness?

Mr. Collett: No.

Redirect Examination

Mr. Collett: Q. Calling your attention to Government Exhibit 23, which is Motor Carrier Explosive—Dangerous Articles Tariff No. 7, and Government Exhibit 24, and Dangerous Articles Tariff No. 6, would you look in each of those exhibits, and calling your attention, first, to detonating fuses —what is the classification with regard to that particular commodity as a maximum hazard or a dangerous explosive?

Mr. Russell: Just a moment; could I have the question?

The Court: He says it is classified as type A. What is the classification?

A. The classification is divided into three parts,——

The Court: Dangerous——

A. ——B and C—and under the Explosive Tariff No. 6 they have been further identified as Class A

(Testimony of William L. Harrison.)

dangerous explosives, Class B, less dangerous explosives, and Class C, relatively safe.

Mr. Collett: Q. And in this Government Exhibit No. 23, the Tariff No. 7, the term is what?

A. Maximum hazard and flammable hazards, and minimum hazard.

Q. The commodity explosive projectile for cannon, what [165] is that classification?

A. That is type A.

The Court: And designated "dangerous explosives". A. Yes.

The Court: That is the classification?

A. That would be in the classification in No. 6, classified as that.

Mr. Collett: Q. In Government's Exhibit 24, which is Tariff No. 6, it is classified A dangerous, and in Government Exhibit 23? A. Type A.

Q. I will call your attention to the commodity rocket ammunition with empty projectiles in Government Exhibit 24 Tariff 6. How classified?

Mr. Russell: If the Court please, I would like to object to that question on the grounds that it is incompetent, irrelevant and immaterial to the proceeding, on the basis that Tariff No. 6, Exhibit No. 24 was not an existing regulation in the Commission at the time this transportation moved.

I make that objection and realize fully that I have interrogated with respect to both, but my interrogation, as I indicated, went to the question of the meaning of the terms, and we are here going down attempting to fix a classification character-

(Testimony of William L. Harrison.)

izing the nature of the commodity [166] upon the basis of a regulation of the Commission which has no longer any probative force.

I might state that I have no objection to Counsel asking the same question he now asks if it is posed and directed to Exhibit No. 23, the current regulation.

Mr. Collett: If the Court pleases, the two exhibits are there, they have been used extensively with reference to various portions I am calling the Court's attention to, the designation in each of the Exhibits as pertaining to——

The Court: Objection overruled. Can you answer that?

A. Pardon me. The rocket ammunition was explosive projectile, you asked me?

Mr. Collett: Q. Rocket ammunition with empty projectile. A. Is typified as B here.

Q. B in which exhibit?

A. That is Exhibit No. 23, which is Tariff No. 7.

Q. And in Government Exhibit 24, Tariff No. 6?

A. I can answer that without looking because I have checked these, but I will——

Mr. Russell: In the interest of saving time, if the Court please, I believe Counsel is proceeding——

Mr. Collett: I am going to go through them.

Mr. Russell: Each one. Might it be understood——

The Court: Maybe you can get a stipulation.

Mr. Russell: Might it be understood that as he

(Testimony of William L. Harrison.)

asks [167] this question related to Exhibit No. 24 that I have the objection previously urged, and we might have a stipulation that the Court's ruling will be the same, on that, to avoid my objection to each time you ask a question.

Mr. Collett: That is agreeable.

The Court: The record will so show.

Mr. Collett: You want to stipulate to each one of these? It will save my time in asking down the line on each count?

Mr. Russell: I couldn't do so at the moment. The reason I am hesitating for the moment, when you gave the figures earlier to the Court, I had a difference of one count.

The Court: Five?

Mr. Russell: No. I had a difference as to one in number, as to how many were shown in Exhibit 24 as A, and how many shown as B.

The Court: You gentlemen settle that. There is a gentleman of importance waiting here. We will hear from him.

(Thereupon the Court proceeded to another matter, the case at bar continuing after a ten-minute recess.)

The Court: Now, gentlemen, have you made up your mind what to do?

Mr. Collett: Yes, if the Court please. I have been referring to Government Exhibits 23 and 24, which are the two Tariffs 6 and 7, and endeavoring from each of those to have the witness as to the classifi-

(Testimony of William L. Harrison.)

cation type, A, B or C [168] explosive. Counsel has made an objection as to Government Exhibit 24.

Mr. Russell: Of materiality, upon the ground——

Mr. Collett: We are ready to stipulate as to the classification of each one of the types of explosives named in the counts, and I will run down the list.

It is to be understood that the defendant's objection as to Government Exhibit 24, which is Tariff 6, runs to each one of the classifications.

The Court: The record will so show.

Mr. Collett: Count 1, it is testified, is Class A, that is detonating fuses.

Count 2,—explosive projectile for cannon—Class A.

Count 3—rocket ammunition with empty projectiles—Class B.

Count 4—ammunition for cannon with explosive projectile—Class A.

Count 5—fireworks special—Class B.

Count 6 has been dismissed.

Count 7 has been dismissed.

Count 8 has been dismissed.

Count 9—hand grenades—Class A.

Count 10 has been dismissed.

Count 11 has been dismissed.

Count 12—ammunition for cannon with explosive projectile—Class A. [169]

Count 13—ammunition for cannon with explosive projectile—Class A.

Count 14—ammunition for cannon with explosive projectile—Class A.

(Testimony of William L. Harrison.)

Count 15—ammunition for cannon with explosive projectile—Class A.

Count 16—ammunition for cannon with explosive projectile—Class A.

Count 17—ammunition for cannon with explosive projectile—Class A.

Count 18—fireworks special—Class B.

Count 19—ammunition for cannon with explosive projectile—Class A.

Count 20—black powder—Class A.

Mr. Collett: Q. Mr. Harrison, what is a participating carrier?

Mr. Russell: To which I am going to object on the ground it is incompetent, irrelevant and immaterial, and it is outside—it is no proper redirect examination.

The Court: I will give him a record on it. The objection will be overruled. You may answer.

A. I can best explain that by reference to this Tariff. This happens to be an explosive Tariff. There are no rates involved in this tariff.

Generally the basis of a tariff is rates, but [170] each carrier does not publish, generally speaking, its own tariff. A lot of smaller carriers do. The larger carriers issue a tariff by a tariff publishing agent. In other words they hire somebody to publish a tariff and they become a participating carrier, by issuing what they call a power of attorney to that issuing agent.

In this instance this tariff is published by the American Trucking Association, its agent by F. E.

(Testimony of William L. Harrison.)

Freund, the publishing officer, and you will note in the fore part of the tariff the list of participating carriers, in other words those carriers who have issued a power of attorney to this issuing officer and thereby make this tariff their tariff.

Mr. Collett: Q. The defendant West Coast, is it named in that group of participating carriers?

Mr. Russell: May it be understood I have the same objection to this question as to the previous one?

The Court: Note the objection. The objection will be overruled. Let the witness answer.

A. Yes, in certificate No., which is listed, 55905, date of issuing power of attorney, and it is listed as a participating carrier subscribing to this tariff.

Mr. Collett: No further questions.

Mr. Russell: I have just one question, if I might on recross. [171]

The Court: Proceed.

Recross-Examination

Mr. Russell: Q. Mr. Harrison, the procedure which you have just described of the participation by West Coast in the tariff is such that under the regulations of that tariff they participate only to the extent of their atuhority so to do as issued by the Commission, there is such a rule in the tariff, is there not?

A. Well, all tariffs have this provision in it, in effect, that the provisions of the tariff apply only insofar as the operating authority of the carrier is involved.

(Testimony of William L. Harrison.)

The Court: That is to the forwarding carrier?

A. Well, it could, if they are participating carriers. That is true.

Mr. Russell: Q. To clarify the matter a little further, Mr. Harrison, the document is prepared, is it not, so that it can be used by a multitude of people who may have a variety of operating authorities?

A. The general tariff is, that is correct, and so indicated by the number of participating carriers in this tariff.

Q. And the purpose of the rule to which I have directed your attention is so that each carrier will be a participant in the whole document only to the extent of his particular authority, is that not correct?

A. Well, that is substantially correct. We have found [172] many instances where a carrier with limited authority has participated in a certain tariff and by virtue thereof considered that they have authority to operate in all respects covered by the tariff.

Q. You are not making any inferences with respect to this defendant in that regard, are you, sir?

A. No, no, that is true.

Mr. Russell: That is all. Thank you.

(Witness excused.)

Mr. Collett: If the Court please, that is the Government's case.

Mr. Russell: If the Court please, I have two motions which I would like to make before presenting evidence, and I wish to confess that I have limited experience in criminal proceedings before this Court. My examination of the Rules of Procedure lead me to believe that a motion for acquittal almost nearly fits the situation of the motion that I am about to make. However, as I have indicated to the Court ,in a sense the matter is directed to jurisdiction, not in the absolute sense, but jurisdiction in a policy sense, and I rather construe the motion for acquittal being one directed to the sufficiency of evidence, and I will state my grounds and I trust and hope that the Court, if it feels it is well taken, will determine whether or not the words "motion for acquittal" are properly to be applied or "a motion [173] to dismiss" in view of the——

The Court: They are synonymous.

Mr. Russell: I have given some indication of the motion in my discussions previously. The motion, I think perhaps I can best explain, if I were to take simply one of the documents here, any one at random, to use as an example.

I happen to pick up the one relating to Count 9, Exhibit 7, which is Box Hand Grenades.

It is the position of the defendant that the commodity which it is alleged by the Government was transported was a box of hand grenades, so that the Court now has the problem of deciding whether or not that particular article falls within the scope of the certificated authority of this defendant. I think quite naturally the first point of inquiry, since we

are charged with operating without a certificate—that is the basic charge, not the transportation of explosives as such—that as such is not the crime provided—you comply with certain other statutes.

We then turn to the certificate, which is Exhibit 1. In doing so, and with particular reference to the portion on sheet 4, to which attention of the Court was specifically drawn by Mr. Collett yesterday, we find the language "Generally commodities except—" listing a number of exceptions, among which is "except dangerous explosives". But we do not find any exception against the transportation of hand [174] grenades as such, so that, in order to determine this proceeding the Court is called upon to determine whether or not hand grenades, and I am using that simply as the example that I happened to pick, is a dangerous explosive, so as to fall within that exception.

At that point the Court is presented with the problem, which the Court has indicated something of previously by the comments to the Court "explosives are dangerous." That's the first problem.

The Court: The defendant got notice.

Mr. Russell: Very well, I appreciate that, sir, and that is a point which I think involves a consideration of evidence which can only come after we have passed a certain point. [175]

* * * * *

Now, I would also like as a part of my motion and as a separate part thereof to direct the Court's attention to the fact, strictly on the basis of the evidence, that there has been an insufficiency of proof.

All that the Government has put in in this proceeding to establish the fact that on trucks of the defendant there rolled over the highway certain products or certain freight bills which, it appears, related to shipments coming from the Government of the United States in a sealed condition which this defendant could not see; and that at least in all of the counts of the information with respect—except 2—the Government's representative did not even see the underlying document which he believed was used as the basis of description, to wit, the bill of lading. So here we are arriving at an attempt to convict upon hearsay, if you will.

Let us assume that in each instance a bill of lading was shown, and that the bill of lading did reach the hands of the defendant, or we will take the three where they did, or the two, rather. The evidence is clear that the investigation of Mr. Harrison did not go beyond the point of discussing with the accounting people, who in turn were speaking just from an accounting standpoint—no more than in effect, "Here is a record from our records." Now the only justification that possibly exists for these documents is on the course of business exception to the hearsay rule. [196]

Now here we have affirmatively shown one of the elements lacking, which is necessary to the course of business doctrine as a prerequisite, and that is any proof of the fact of actual knowledge of the act as such. In other words, it was simply a ministerial act, if I may put it that way—the preparation of a document to permit its movement on a vehicle,

the contents of which were actually known. But let's suppose that we do say, "All right, that document of the defendant is of some value; it was in its records." Where did these words "percussion fuses" or "detonating fuses" come from? Mr. Harrison has indicated he doesn't know from his own knewledge, except possibly as to two counts, where he has a copy of the bill of lading. Let's take those two. He says, "All right, that was taken."

The Court: That is in the record here.

Mr. Russell: That is my understanding of the record. Isn't that correct, sir?

We take that document. That document is again a business record in and of itself.

The Court: Well, how can you condemn it because it is a business record?

Mr. Russell: I am not condemning it because it is a business record; I am saying it is a hearsay, or a form of hearsay which is allowed because it is a business record.

The Court: Yes. [197]

Mr. Russell: It is given certain credibility.

The Court: I see.

Mr. Russell: But nonetheless, it is a record made in the course of action by someone. Now that someone is not a part of the defendant's organization. That is not someone with whom the defendant has personally dealt. All of the shipments moved through the hands of someone else before they arrive at the defendant, into the defendant's possession. But in any event, we go back to the proposition that that document was prepared by someone else, in which certain words were used.

Now I have developed through the examination of Mr. Harrison, I think, in connection with this firework special, that that again is a generic term. [198] It involves a matter of independent judgment by the person using it as to whether or not the specific product, whether it is a roman candle or a flare, is properly to fall within that classification of fireworks special.

So back of this business document, the bill of lading, is an element in virtually all of these cases, if not all of them, of personal judgment of someone who is not here, who did not see this commodity, and who, in making it, may never have seen the commodity. We don't know. We don't know. We have no proof in this record, no direct proof except these words in a freight bill which come through all that chain of circumstances.

The Court: That is to my mind a notice. [199]

* * * * *

If the Court please, I have a very sincere belief that this is a matter which should be presented upon the merits, and I have accordingly argued my motion on the merits first, to wit: The insufficiency of the evidence and, secondly, the matter of the primary jurisdiction doctrine. I do, however, feel that I owe it to my client to exhaust all motions and remedies which I feel are available, and I [204] therefore in accordance with the permission that was given by the Court make at this time the motion to strike Exhibits 3 through 22, both inclusive, and the testimony of Mr. Harrison, with respect to those exhibits as to anything that they may show, his testimony as to what they reflect, as

being hearsay in this proceeding, incompetent, irrelevant and immaterial, and failing to establish as proper evidence the fact of transportation. [205]

* * * * *

The Court: For the purpose of the record, your motion will be denied.

Mr. Russell: If the Court please, at the conclusion of my statement yesterday, just before the interruption, I had made a statement of a motion to strike in addition, the documents on the failure to establish the foundation, and on the ground that they called for hearsay under the——

The Court: I think you covered that.

Mr. Russell: Well,——

The Court: If you did not, I will allow you for the purpose of the record to make a general objection.

Mr. Russell: Well, I did, and I was urging—I made an objection to the documents subject to a motion to [227] strike, and I was now seeking to make the motion to strike those documents and the testimony of Mr. Harrison, which undertakes to be a statement from those documents, because it appears to come from their source and nowhere else. Also on the ground that they are hearsay and are not admissible in this proceeding, to establish the fact of transportation. I take the liberty of mentioning it here because the Court's statement may have been a ruling on the motion, and I thought possibly there might be some different ruling with respect to the sufficiency of these documents to meet the requirements, which would make a con-

siderable difference in the presentation of the defense.

The Court: Let the record show the motion will be denied.

Mr. Russell: Is Mr. Strock in court?

MELVIN E. STROCK

a witness called on behalf of the defendant, sworn.

The Court: Q. Your full name, please?

A. Melvin E. Strock, S-t-r-o-c-k.

Q. Where do you live?

A. San Francisco, sir.

Q. Your business or occupation?

A. I am the district manager for West Coast Fast Freight in the Bay Area.

Q. And how long have you been so engaged?

A. Since September 1947, sir. [228]

The Court: Proceed.

Direct Examination

Mr. Russell: Q. Where are your personal offices located in the Bay Area, Mr. Strock?

A. In Oakland, California.

Q. Where are they with respect to the terminal properties of the defendant? Are they on the terminal properties?

A. That's right, right on the terminal properties.

Q. Calling your attention to the period from September 3, 1950 to May 6, 1951, I would like to ask you, sir, were you on a daily basis substantially all of the time regularly at that place of business? A. Correct.

(Testimony of Melvin E. Strock.)

Q. What are your duties at that place of business?

A. Well, I am the district manager. I have quite a few people working with us. Full charge of all the personnel and the records of the company and—well, that just about covers it.

Q. Do you have occasion personally to see or did you during that period did you have occasion personally to see loads of freight coming in and going out of your place of business at Oakland?

A. Daily.

Q. Did your company during that period of time transport certain freight beyond Oakland, California for the Sierra [229] Ordnance Depot at Herlong, which came to you by Wells Cargo and other carriers? A. We did.

Q. Did you ever have occasion to see any of those leave? A. Certainly.

Q. Do you have some general idea of the total number of those shipments that were handled, those truckloads that were handled? A. Well——

The Court: Approximately.

Mr. Russell: Q. Just approximately.

A. I know that we have handled quite a few of them.

Q. Could you give me any idea of approximately what proportion of those vehicles you may personally have seen?

A. I would say 75 per cent at least of all the vehicles out of the terminal, I will see.

Q. Do you have any specific recollection here—strike that question.

(Testimony of Melvin E. Strock.)

Have you had some opportunity to familiarize yourself with the different shipments which it is alleged, which make the basis of the information in this proceeding?

A. Do you mean—. I want to get this straight.

Q. Have you had some chance since the case has been pending to inquire with respect to these particular shipments? Not with respect to its safety, but just to know which ones they are. [230] That is what I had in mind. A. Yes, yes.

Q. Do you have any independent specific recollection of having seen any one of these at the time that it was in the truck yard?

A. Well, I would say I would see the van or the vehicle, but not the contents.

Q. Can you tell me, sir, whether or not those vehicles were sealed? A. Always sealed.

Q. Would you describe the seal?

A. Well, a government seal carries a number and usually the name of the depot that it is shipped from. For example, on the Herlong shipments the seal reads "SRA", and then the numbers of the seal.

Q. Where are those seals physically placed?

A. Well, on the rear doors.

Q. If the truck has more than one door, are all doors sealed?

A. All doors are sealed by the government.

Q. Do you have any procedure, regular procedure at your office with respect to sealing all vehicles if they are not sealed by the government?

(Testimony of Melvin E. Strock.)

A. We seal all our vehicles running out of the Oakland terminal.

Q. Are those seals that you are now speaking of seals of the company? [231]

A. Seals of the company.

Q. Is there any or was there during this period of time any instruction from you to other employees that if a government seal should not be on a document, that certain procedures should be followed?

A. That's correct.

Q. What were your instructions in that regard?

A. Well, the first thing, if a vehicle would come to us from the government not sealed, we would not move it from our yard. The fact is, we would not move any box from our yard, or van, as we call it, unless it is sealed—either by the government or by our company. If the government should give us a vehicle not sealed or our connecting carrier, we would call—in this case we will use the Sierra Ordnance Depot. We would call the Ordnance Depot at Oakland and ask them to come over and apply a seal and check the contents of the van. This has never happened, to my knowledge.

Q. Did you have instructions outstanding at the time we are here concerned with, between September of 1950 and 1951, that if any vehicle were so found, it should be reported to you or someone else?

A. Reported to me immediately.

Q. Were any reports made, sir?

(Testimony of Melvin E. Strock.)

A. No, sir.

Mr. Russell: Thank you very much. You may cross-examine. [232]

Cross-Examination

Mr. Collett: Q. What was the source of your knowledge of the contents of the cart or trailer?

Mr. Russell: As to which I am going to object as being outside the scope of the direct examination, if the Court please. I inquired here solely with respect to the seals.

The Court: The objection will be overruled.

A. What was the question, please?

(Record read.)

A. Well, from the document.

Mr. Collett: Q. What document?

A. The freight bill presented to us by Wells Cargo, or from any other carrier.

Q. And that was your knowledge of the contents; and from that bill what did you do?

A. From the bill, then we copied from their bill to our freight bill.

Q. And you were familiar with these various freight bills which constitute the government's exhibits 4 through 22; I show you government's exhibit No. 4. That is a freight bill, is it not?

A. That is a freight bill.

Q. Prepared by your office in Oakland?

Mr. Russell: I might interpose an objection——

The Court: Prepared by who? [233]

(Testimony of Melvin E. Strock.)

Mr. Collett: Q. Prepared by your office in Oakland?

Mr. Russell: If the Court please, I don't wish to be constantly interrupting here, but I deem that —I suggest that all this line of inquiry goes beyond the scope of the direct examination, in view of the fact that I limited it to the physical vehicle. We are now getting into other matters of handling. Might it be understood that I have a standing objection to that, to avoid——

The Court: Let the record so show. It will go in subject to your motion to strike again, so that if it appears necessary to you, you may renew your motion.

A. This freight bill wasn't made in Oakland.

Mr. Collett: Q. Where was the freight bill made?

A. Well, No. ones, that is an eight, is the digit, the code, and there is not an—this is not an Oakland freight bill.

Q. Where would that freight bill have been made? A. Made in Tacoma, Washington.

Q. By whom? A. By our company.

Q. Show you government's exhibit No. 5 Where was that freight bill made?

A. That was made in Oakland, California.

Q. And the information thereon was obtained from where?

A. From the Wells Cargo freight bill.

Q. Is there a government bill of lading along with that [234] freight bill?

(Testimony of Melvin E. Strock.)

A. Yes, there would be a government bill of lading. It would have to accompany the shipment.

Q. And the Wells Cargo—is that it, Wells Cargo? A. Wells Cargo.

Q. Wells Cargo freight bill and the government bill of lading? A. Right.

Q. And were they checked before you prepared the freight bill? A. That's right.

Q. That you have as government's exhibit 5?

A. Correct.

Q. And all these shipments you have testified you have checked and you are familiar with them, which constitute the counts which are involved here, and from which the bills are included in government's exhibit No. 3 through 22? That's true—you so testified in answer to your counsel's question? A. Right.

Q. That you have familiarized all those shipments moved from Oakland to Tacoma or Seattle, is that correct?

A. Or various destinations.

Q. And the charges were paid on those bills?

A. That I would not know, sir.

Q. I see. you don't know that. Are you familiar with the matter of charges? You prepared on each of those bills the charge to be made, is that so? [235]

A. That's right.

Mr. Russell: I am going to object to that on the ground it is indefinite and uncertain. Counsel, are you referring to the particular witness or to the company when you say "you"?

(Testimony of Melvin E. Strock.)

Mr. Collett: Well, I think I—I don't think there is any question about it.

Q. I am speaking of you in the preparation of the bill at Oakland, your bill, a sum of money is placed in the column for freight in government's Exhibit No. 3. That says $737.20, is that right?

A. Yes, $737.20.

Q. And that charge is determined how?

A. By a tariff.

Q. By a tariff? A. Yes, sir.

Q. And with regard to explosives which are A or B, is there any difference in the charge that is made, as opposed to, say, general commodities?

Mr. Russell: To which I am going to object, if the Court please, here, on the ground that it is outside the scope of the direct examination. There is—and I pose here the objection anew, in spite of my standing arrangements, because there is no showing that this man has familiarity with the basic facts.

The Court: The objection will be overruled. If you know, [236] you may answer. Is there any differential in the charge for those two?

A. Well, we have, Your Honor, a tariff that we follow that is issued by the Tariff Bureau in Portland, Oregon.

The Court: I understand that. Do you know of your own knowledge, is there any differential in relation to the charge on those two items?

The Witness: No, sir, I believe they are the same, identical, as far as the charges go, sir.

(Testimony of Melvin E. Strock.)

Mr. Collett: Q. By the same—you mean as compared to what?

A. Well, as any other freight or commodity.

Q. Well, is there any additional charge for the transportation of dangerous materials or explosives, as opposed to general commodities?

A. Not to my knowledge.

Q. Not to your knowledge?

The Court: We will take a recess.

(Recess.)

Mr. Russell: If the Court please, it has been called to my attention during the recess that I may have misspoken myself in my statement, and I wish to clarify it, if there is any misunderstanding. I was commenting in my motion with respect to the failure of the government to tie in the bill of lading to the shipping documents here, and I made some [237] statement the exact language of which I do not recall. It might have been considered that I was withdrawing from my previously stated position, to the effect that these documents, as a document, the copies were taken from records which were found in our file, and that, just in case there would be any misunderstanding, I wanted to be sure we were clear on that.

Mr. Collett: Q. Mr. Strock, as a matter of fact, none of the shipments which are involved in the information here, the charges that were made, the charges were not determined from the general commodity tariff, is that true?

(Testimony of Melvin E. Strock.)

A. We have a government quotation tariff, if that is what you are referring to.

Q. Was that in accordance with a bid on a government contract for shipment?

A. No, not the way I understand it. It is just a regular tariff that we have. It's published by the bureau.

Q. By which bureau?

A. By the Pacific Tariff Bureau, in Portland, Oregon.

Q. Do you know whether or not the charges that were made were in accordance with the contract with the government, and particularly the Sierra Ordnance Depot at Herlong, California, pertaining to the charges that have been made on all of the shipments emanating from the Sierra——

A. I wouldn't know that

Q. You don't know that? [238] A. No.

Q. Now when the freight bill in each instance was cut, did you make any effort to ascertain whether or not all of the items that were set forth thereon, particularly referring to the government's exhibits numbers 3 through 22, were permitted as a matter of transportation, in accordance with the certificate of the Interstate Commerce Commission, for the transportation of commodities?

A. Well, we were tendered the shipment by Wells Cargo, actually——

Mr. Collett: Well, if the Court please, I direct the witness' attention to the question, that the answer is not responsive.

(Testimony of Melvin E. Strock.)

The Court: Reframe your question.

Mr. Collett: Q. Did you ascertain in the cutting of the freight bill and the enumeration or the setting forth of the various articles which were being shipped in the respective cars which are included in government's exhibits numbers 3 through 20 whether or not the company, the defendant herein, had the authority in accordance with its certificate, government's exhibit No. 1, certificate of public convenience and necessity,——

Mr. Russell: To which we object at this time, if the Court please——

Mr. Collett: I haven't finished the question, if the Court please. [239]

Q. (Continuing) ——to transport in accordance with that authority the various articles or commodities which are listed in that freight bill?

Mr. Russell: To which I would like to interpose an objection on the grounds that there has been no proper foundation laid to show this witness is a man familiar with that, or that that is within the scope of his knowledge.

The Court: The objection is overruled. If you know, you may answer.

A. Well, the only thing that I know, Your Honor, is that we haul the freight and it is tendered to us by any shipper, and we are a common carrier, and as far as the certificate is concerned, I don't know too much about that. I know that I am instructed to pick up and deliver freight for our company.

(Testimony of Melvin E. Strock.)

Mr. Collett: Q. Regardless of whether or not there is any authority to transport it or not?

A. Well, that, as I say, I didn't know anything about the authority part. I do not know.

Q. You know nothing about the authority of the defendant in accordance with its certificate?

A. I know that we have a permit to operate over certain highways, interstate permit, and a certificate to operate out of the Bay Area to the northwest.

Q. And you are the district manager of the West Coast, of the Oakland office? [240]

A. I am.

Q. And you know nothing about the restrictions contained in that certificate as to the commodities that may or may not be transportable?

A. Well, since you mention it, we have restrictions, because it was mentioned right here in the court. There are restrictions, naturally.

Q. But prior to the time you heard it in this court, you had no knowledge?

A. I would say that we were restricted on certain commodities, that I do have knowledge of certain commodities, but I don't say that I had it specifically on one certain item, like I know that household goods, we were restricted on that. And on live stock. But not on government freight.

Q. Were you familiar with a restriction to except dangerous explosives?

A. There is such a restriction in our certificate, yes.

(Testimony of Melvin E. Strock.)

Q. And you were familiar with the government's exhibits Nos. 23 and 24, the motor carriers explosive and dangerous articles tariff No. 6 and No. 7?

A. No, I am not familiar with that tariff.

Q. You are not familiar with that tariff; are you familiar with the distinction between A, B and C types of explosives? A. No, sir.

Q. At that time you are not familiar with them?

A. Well, the only thing I have heard since I have been in the court room, I have heard you gentlemen speaking about the difference in explosives, whether they are dangerous or not dangerous.

Q. And prior to that time you had no knowledge of your own? A. No knowledge.

Q. These bills of lading and the Wells Cargo freight bills came into your office in Oakland, and particularly calling your attention to government's exhibits Nos. 3 to 22,—freight bills were cut therefrom, the items were set forth, you had no knowledge as a district manager in charge of the Oakland station? A. That's right.

Q. As to whether or not the company had authority to transport any of those articles?

A. As I say, the government—we haul freight for the government every day, and I am no explosives expert. The only thing I know is that we have evidently been hauling this ammunition, as you call it. I don't know whether it is dangerous or not, because I actually never did see it.

Q. Never did see what?

A. The commodity.

(Testimony of Melvin E. Strock.)

Q. Well, you did see the freight bill, didn't you?

A. The freight bill is the only thing that I did see.

Q. Well, you know it is listed on there, the commodities that were listed there? [242]

A. Yes, that is true.

Q. Wasn't there any question in your mind as to whether or not any of those items might be A, B, or C types of explosives in tariffs Nos. 6 and 7?

A. There has never been any question in my mind regarding that, no, sir.

Q. No question in your mind that black powder, hand grenades, explosive projectiles for cannon, and so forth, might be classified A or B in this tariff? A. No, sir.

Q. That they might be dangerous explosives?

A. No, sir.

Q. You made no effort whatsoever to ascertain——

A. No, sir, because as I said, I did not see the commodity. They were sealed vans.

Q. Well, doesn't the term "fireworks special", explosive projectiles for cannon, black powder, hand grenades" in your mind raise any question as to whether or not they are dangerous explosives?

A. Well, I would say there is a difference between fireworks and explosives, yes.

Q. Well, leave the fireworks out; how about the explosive projectiles for cannon? Detonating fuses, rocket ammunition with empty projectiles, ammunition for cannon with explosive projectiles? [243]

(Testimony of Melvin E. Strock.)

A. To me, that isn't dangerous.

Q. What was the answer?

A. To me, as I say, I don't know anything about explosives, and to me, as I say, it isn't dangerous.

Q. Have you used this motor carriers dangerous articles and explosive articles tariff No. 23 and 24?

A. We have that tariff in our file, evidently, yes.

Q. You evidently have it; haven't you ever seen it before? A. No.

The Court: What's that, sir?

The Witness: I did not see it, sir. I don't see that tariff. You see, we have a rate department that takes care of our tariffs in our office.

Mr. Collett: Q. And as a district manager in charge of the office in Oakland, you say you are not familiar with this tariff? Have you seen it before you came into the court room?

A. I have never seen it before.

Q. You have never seen this before you came into this court? A. I have not, no, sir.

Mr. Collett: No further questions.

Mr. Russell: I have just a few questions.

Redirect Examination

Mr. Russell: Q. Now, Mr. Strock, did you at any time, or did any member of your organization to your knowledge, in Oakland, ever have an opportunity to check the contents of [244] these vehicles against the freight bills that Wells Cargo may have given you, or the bill of lading, to check physical contents against those documents?

(Testimony of Melvin E. Strock.)

A. We were never permitted to.

Q. Do you have an opportunity to check the commodities against the freight bill when you handle freight for private persons? A. We do.

Q. What do you do in that regard?

A. Well, a shipment that is picked up by us or delivered ot us, the freight is loaded in a van and actually we physically handle it across the dock, load it in a van. We see the commodity and then it is billed, our bill is cut, similar to these bills which you have in exhibits.

Q. At any time is the merchandise which is actually going in the van checked against any records which you may have, bill of lading or otherwise?

A. Each individual shipment is checked, the commodity is checked against the bill of lading when it is loaded on the vehicle. That's our regular procedure, sir.

Q. Did you have an opportunity to do that at any time with any of the loads moving out of Herlong? A. No, sir.

Q. Why was that?

A. Because they were sealed by the government and we were not permitted to break that seal. [245]

Q. Can you tell me, sir, has your company handled government traffic out of Herlong other than these shipments, to your knowledge—other than the shipments that are specifically here involved? A. Not to my knowledge.

Q. These were the only shipments that you handled out of Herlong, is that your recollection?

(Testimony of Melvin E. Strock.)

A. Oh, we have handled— I mean, we have handled shipments other than as on exhibit here, yes, sir.

Q. Do you handle or control anything in connection, in your office do you do any of the work in connection with pricing, tariffs, in connection with your company?

A. No, that is in our rate department; we have a rate department.

Q. And do you have someone at Oakland in charge of that rate department? A. We do.

Q. And to whom are they responsible ultimately in your organization?

A. To the general traffic department and the district manager.

Q. And where is the general traffic department located? A. In Seattle, Washington.

Mr. Russell: That is all I have. Thank you, Mr. Strock.

Recross Examination

Mr. Collett: Q. Mr. Strock, calling your attention to [246] Title 49 of the code of federal regulations, Section 77823, provides for marking of motor vehicles and trailers other than tank motor vehicles; which provides that every motor vehicle transporting any quantity of explosives, class A, poison gas, class A, or radioactive material, poison, class D; requiring red radioactive materials label; every motor vehicle transporting 2,500 pounds gross weight or more of explosives class B, flammable liquids, flammable solids or oxidizing materials, cor-

(Testimony of Melvin E. Strock.)

rosive liquids, compressed gas, class B, poison and tear gas of 5,000 pounds gross weight or more, of two or more articles of these groups, shall be marked or placarded on each side and rear of a placard or lettering in letters not less than three inches high on a contrasting background as follows:

> "Explosives class A, explosives, explosives class B, dangerous."

Do you mean to tell me that you didn't know whether or not any one of the trucks going out of your office should or should not be placarded in accordance with that section?

A. All equipment that is on exhibit here was placarded by the United States Government.

The Court: He asked you if you had any knowledge.

The Witness: That they were placarded, is that what you want to know?

Mr. Collett: (To the reporter) Read the question, Mr. Reporter. [247]

(Record read.)

A. I know this, that we handle anything—if we handle anything——

The Court: It isn't what you handle; are you familiar with that regulation or that law which he read?

The Witness: Well, sir, Your Honor, the only thing that we have handled that comes under that category is here on exhibit, and of course they were

(Testimony of Melvin E. Strock.)

placarded. As I remember, that is all we have ever handled, to my knowledge, and that's the reason why I am answering the way I am.

Mr. Collett: Q. Did you ascertain in each case the shipments involved in government's exhibits 3 through 22, whether or not the commodity which you set forth in your freight bill called for that car to be placarded in accordance with that regulation?

A. Since the army—I am going to answer it this way: since the army loaded the vehicle, they must placard it to meet with the regulations set forth by the Interstate Commerce Commission. And all the vehicles that we haul are pulled out of our terminal, was placarded according to that regulation.

Q. How do you know?

A. Well, when you ask how do I know—perhaps I understood it that the army would not ship or send over the highway without it not being properly placarded.

Q. Do you mean to tell this court that there is no [248] responsibility on the part of this carrier in transporting dangerous explosives on the highways of the United States and the State of California and every other state, if the army did not put that placard on there?

Mr. Russell: To which I am going to object, if the Court please—assuming facts not in evidence, and it is argumentative.

The Court: He may answer. The objection will be overruled.

(Testimony of Melvin E. Strock.)

A. Well, I know one thing. If the army didn't placard it, we wouldn't haul it. It wouldn't have gone out of our yard.

Mr. Collect: Q. Well, how would you know whether or not you should haul it?

A. Well, as I said before, if the army gave us a box loaded with ammunition, or whatever the commodity was, and required a placard, they would certainly apply it before they would turn it over to us.

Mr. Collett: I ask that be stricken as not responsive to the question, if the Court please.

The Court: It may go out. Not responsive. Reframe your question. Proceed as rapidly as we may.

Mr. Collett: Q. Mr. Strock, are you familiar with the provision of 18 USCA 35, which fixes a penalty of a thousand dollars for failure to properly placard a car, trailer, carrying dangerous explosives on the highways of the United States?

A. No, I am not familiar with that, no, sir. [249]

Q. You are not. What do you consider to be the responsibility of the company with regard to complying with the laws in the transportation of dangerous explosives on the highways of the State of California and the United States?

Mr. Russell: I would like to object to that, if the Court please, on the grounds that there has been no proper foundation laid to show the qualification of the witness, that it is outside the scope of the direct examination.

The Court: He is a manager.

(Testimony of Melvin E. Strock.)

Mr. Russell: A local manager in Oakland, yes, Your Honor.

The Court: Yes; objection overruled. He may answer.

Mr. Russell: Do you have the question?

The Witness: I haven't.

The Court: Read the question, Mr. Reporter.

(Record read.)

A. We certainly would comply with the law and nothing would depart from our station or what you call our station, our terminal, unless it was properly placarded to move on the highway in the state, in safety.

Mr. Collett: Q. What did you do to assure that you were in compliance with the provisions of Title 49, Code of Federal Regulations, Section 77823, relating to the placards to be placed upon trailers or semi-trailers being transported by the defendant West Coast?

A. Our traffic department, sir, would instruct us on that, [250] and we would follow their instructions and see that that particular vehicle was placarded properly from those instructions.

Q. Do you know that all of the cars that were transported involved in Defendant's Exhibits 3 through 22 were placarded? A. Yes, sir.

Q. In accordance with that regulation? Do you know that? A. Yes, sir.

Q. How do you know it?

A. As I say, we asked our traffic department to

(Testimony of Melvin E. Strock.)

give us the rules and the instructions how to see whether or not they were properly placarded, and we followed those instructions and did not roll the equipment out of the yard until they were followed.

Q. Well then, you are familiar with the regulations pertaining to class A and class B explosives?

A. No, I wouldn't say that. Although as I say, we would follow, if you were handling a load like this, you have an exhibit here, and if there were not placarded properly, and the traffic department said there was something wrong with it, the box wasn't properly marked, we certainly would see that it was marked properly before it left our yard.

Q. Now calling your attention to explosives, projectiles for cannon, you set forth on your freight bill that the car consisting of explosive projectiles for cannon is being transported; what sort of a placard would you put on? [251]

A. Well, I know that there is a placard that is square, I am sorry that we haven't one here. But it is a square, it is about, I would say, two foot square, marked in red, "Explosives". And that's put on the vehicle on the rear doors, the sides, and if I remember correctly, the front of the vehicle. That placard is furnished by the government, they tape it on themselves. They apply the placard. We do not. But in case it wasn't placarded per the instructions, and the tariff, or from our traffic department, we would go to the Army Ordnance Depot in Oakland and ask for a placard to replace the one that was missing.

(Testimony of Melvin E. Strock.)

Q. In government's exhibits 3 through 22, was there any question as to the manner in which any one of the trailers carrying the commodities listed on your freight bills, as to what placards should go on the trailer? A. Not to my knowledge.

Q And when you refer to the tariff and regulations, are you referring to government's exhibits 23 and 24, tariffs Nos. 6 and 7?

A. As I said before, sir, we go to the traffic department and ask for instructions. If they are properly placarded, or whether they are—whether they are where they are supposed to be. And they instructed us and we follow those instructions.

Q. And when you use the term "explosives" as to the particular item I refer to, explosive projectiles for cannon, that is [252] referred to in 49 Code of Federal Regulations 77823, explosives class A, explosives. It calls for placards on each side and rear, with a placard or lettering in letters not less than three inches high on a contrasting background as follows, is that right?

Mr. Russell: To which I object on the ground that there is no proper foundation laid to show the witness is familiar with the contents of the document counsel is reading. He is now asking him something which is more of a statement in argument.

The Court: If he knows, he may answer it. The objection will be overruled.

A. Well, I don't believe I—I don't know that.

Mr. Collett: Q. You don't know that when the

(Testimony of Melvin E. Strock.)

explosives is put on placard, with explosives, in the manner in which you described it on a trailer, that that means contains explosives class A?

A. I know when the army gave us, Wells Cargo gave us a box from Herlong, they were placarded with an explosives on them, and I know that—they were on the rear doors and they were properly applied, so we hauled the boxes, because we knew then that they were meeting the regulations.

Q. How did you know?

A. As I said before, we asked for the traffic department and they informed us it was all right.

Q. Well, you personally—how did you know whether the term "dangerous" should go on there, as opposed to "explosives"?

A. Well, you have a freight bill from Wells Cargo that describes the merchandise. You are certainly not going to pull it out of the yard without it being properly placarded.

Mr. Collett: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Russell: I have one question.

(Witness resumes stand.)

Further Redirect Examination

Mr. Russell: Q. Now counsel has been asking you a number of questions relating to these regulations and to the documents exhibited here, these regulations; so that the record may be clear, I point to volumes in front of him and these two

(Testimony of Melvin E. Strock.)

documents. Does your company give you any regulations as a part of their own company regulations that deal with the way you should handle different kinds and classes of merchandise?

A. They certainly do. We follow our—we have the instructions what to do.

Q. Do you recall whether or not in those instructions there are any instructions relating to the physical handling of explosives? A. Yes, sir.

Q. Now when you say, when you refer to your traffic department, [254]

A. That is what I am referring to.

Q. —what generally is the function of your traffic department at your place of business?

A. Well, they have all the tariffs and the classifications, they rate all of our freight bills, and if there should be a freight bill that comes across their desk, if there was any question about it whatsoever, they would tell us about it, the loading or the unloading crew, or your supervisor, so he would realize that there was something radically wrong with that particular shipment.

Q. May I ask you, sir, exhibits 3 through 22, these documents—to the extent that they show preparation in Oakland, would they be physically prepared in the traffic department?

A. They would be.

Q. If you office at Oakland undertook to maintain tariffs, would the customary place for those be in the traffic department? A. That's right.

Mr. Russell: That's all. Thank you, Mr. Strock.

(Testimony of Melvin E. Strock.)

Mr. Collett: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Russell: If the court please, I would like to call Mr. Shepherd. [255]

I. W. SHEPHERD

called as a witness on behalf of the defendant, sworn.

The Court: Q. State your full name to the court for the record.

A. I. W. Shepherd, S-h-e-p-h-e-r-d.

Q. Where do you reside?

A. Seattle, Washington.

Q. Your business or occupation?

A. I am secretary and general traffic manager of West Coast Fast Freight, Inc.

Q. How long have you been so engaged?

A. I have been with the company since they were first organized in 1944, and occupied my present position with the company since April of 1946.

Q. What is the nature of your work?

A. I have complete charge of all matters affecting the company, publication of tariffs, claims and related matters.

The Court: Proceed.

Direct Examination

Mr. Russell: Q. Do you have, Mr. Shepherd, under your direct management and control and supervision, the matter of applying by your com-

(Testimony of I. W. Shepherd.)

pany for certificates or seeking new rights, if any such are sought? A. Yes.

Q. Are you the person that handles the arrangements made for [256] legal counsel and the necessary steps for the preparation of such cases?

A. Yes.

Q. Do you in connection with your duties as a general traffic manager have any occasion to make general supervision over the records to determine and follow to some extent what traffic is flowing over the lines of your company? A. Yes.

Q. What generally do you do to keep in touch with that matter?

A. I have an audit department set up in the general office which makes spot or periodic audits of freight bills of various stations. They may audit one particular station's billings today, they may go back and audit that same station again next week, it might be three weeks before they get around to performing another audit. It might cover an audit, a period of one day—it may cover an audit of a period of a week. But in that manner we keep to a certain degree abreast of the traffic that is moving over our system.

Q. Are those audits reported to you?

A. They are.

Q. Approximately how many stations was your company operating over its system in the period between September of 1950 and May of 1951?

A. At that time I think we had in the neighborhood of twelve [257] or thirteen company stations

(Testimony of I. W. Shepherd.)

plus in excess of thirty commission agency stations.

Q. Do you have any ideas of how many vehicles the company was operating at that time?

A. We were operating in excess of 150 over-the-road power units and in excess of 200 over-the-road trailers or vans.

Q. When you speak of over-the-road equipment, could you tell us what you are talking about?

A. I am talking about line-haul equipment or the vehicles that travel from station to station or terminal to terminal with freight, moving from city to city, as distinguished from the small or pick up and delivery units which are used exclusively at the consolidation and distribution points for the purpose of picking up and delivering of freight.

Q. Are you able to give me any idea of what the volume of the number of shipments was, approximately, that you were handling in September in the aggregate, your company? Do you have any such information?

A. I could give an approximation.

Q. To the best of your recollection, what would have been that, approximately?

A. At that time it would approximate somewhere in the neighborhood of between 40,000 and 60,000 shipments a month.

Q. Now I would like to direct your attention back to the period prior to September of 1950, just prior, and ask whether [258] or not there came to your attention the fact that any traffic was begin-

(Testimony of I. W. Shepherd.)

ning to move over your lines out of Herlong, California? A. Yes.

Q. Do you know whether or not your company had submitted to the United States government army authorities or military authorities in Washington a bid to transport military traffic at about that time?

A. Well, we don't refer to them as bids, we refer to them as Section 22 quotations—quotations submitted under Section 22 of the Interstate Commerce Act, which provides for free or reduced transportation.

Q. Did you submit such a quotation to the government? A. We did.

Q. Can you tell me whether or not that was accompanied with a copy of your certificate, a copy of which is also here in evidence as exhibit 1?

A. I don't recall that the certificate was or was not submitted at that same time, but a copy of the certificate and other pertinent matter relating to the company's operations were submitted.

Q And to whom?

A. It was submitted to the—I don't recall the specific name of the division. I think they call it the OCT, office of the——

Q. Office of the Chiefs of Transportation? [259]

A. That is it.

Q. And where are they located?

A. They are located in Washington, D. C.

Q. Do you know from the standpoint of arranging and handling traffic matters of your company,

(Testimony of I. W. Shepherd.)

whether or not the government requires that you make arrangements for handling government traffic with the Washington offices? A. Definitely.

Q. Was that the standard procedure at that time?

A. Yes, you must make arrangements with the Washington offices.

Q. This quotation that you have mentioned as giving; was that restricted in any way to explosive items or did it include other products?

A. It covered other products.

Q. Did it describe products specifically, do you recall?

A. The quotation, as I recall it, covered the description of freight, and I do believe there were a few exceptions, which exceptions were not tied to the operating authority but were tied to the fact of the lightness or lack of density of traffic. The light articles, or those which did not have much density per cubic foot, were excepted from the quotation, and the quotation was not applicable on those commodities.

Q. And did you at or about that time furnish a copy, did I understand, of your certificate to that authority in Washington?

A. Yes. In fact, the operating authorities were in their [260] possession a considerable period of time prior to the submission of the Section 22 quotation.

Q. Let me ask you, sir, during that period of time and continuing, have you had occasion to have

(Testimony of I. W. Shepherd.)

contact with that office from time to time on matters other than this section 22 authority?

Mr. Collett: If the Court please, the Court has allowed great latitude——

The Court: We are going afield.

Mr. Russell: I am simply asking the question for the purpose of demonstrating that this was not an isolated instance, to develop the fact, the familiarity of the witness with this matter. I won't pursue it further. That was the purpose of the question.

The Court: Very well.

A. Yes, we have had subsequent deals with the OCT.

Mr. Russell: Q. Mr. Shepherd, to your knowledge following the submission of that quotation, did your company begin to receive freight coming to your lines which originated from Herlong?

A. Yes.

Q. Did you undertake to make any investigation or examination of the character and type of that freight after it came to your attention that such freight was moving? A. Yes. [261]

Q. Your offices are located in Seattle, is that right, sir? A. Yes.

Q. Did it come to your attention at that time that certain items of an explosive character were being moved? A. Yes.

Q. Were you aware, sir, of the fact that your certificate contained certain language with respect to explosives, specifically calling attention to that by way of exception or otherwise?

(Testimony of I. W. Shepherd.)

A. I was.

Q. What did you do at the time that matter came to you to investigate the situation?

Mr. Collett: I object now as to what matter——

The Court: The matter is here in question.

Mr. Russell: What did you say?

The Court: The matter is here in question.

Mr. Russell: Well, if the Court please, the government has offered in evidence the proceeding, the pending proceeding to the Interstate Commerce Commission, as exhibit 2, I believe—certain portions of that record, which shows that it was filed in October of 1950, initially. I conceive that the only possible materiality of that document to this proceeding is an attempt to show that it is willful and knowing and that when we said we went in and said we needed a certificate to transport these, that we knew we didn't have it, and this line of [262] inquiry is intended to develop the historical sequence of events which produced that application, in order that it might explain the application and why it was filed, and its purpose.

The Court: Well, I will give him an opportunity to get a record on it. The objection will be overruled. Proceed.

(Record read.)

Mr. Collett: Well, I object further; that question, at the time that matter,—that is ambiguous, not specific.

The Court: Identify what you mean.

Mr. Russell: Q. I believe I had asked you in

(Testimony of I. W. Shepherd.)

the previous question if it came to your attention that some explosive items or items that appeared to be explosive in character were moving over your lines out of Herlong. I had asked you that, and you said yes, as I understood it. Now I asked you what you had done to investigate that situation.

A. I analyzed our certificate and the regulations of the Commission to——

Q. What regulations are you referring to, sir?

A. I am referring to regulations with respect to the transportation of explosives and other dangerous articles.

Q. I call your attention in order that we might understand,—would that be the document which appears here as exhibit No. 23?

A. I examined both documents. Well, at that particular time, I believe it is in the record as government's exhibit 24. [263]

Q. Exhibit 24, and——

Mr. Collett: At this time, tariff No. 6.

The Witness: Tariff No. 6.

Mr. Russell: Q. And were there supplements to this document at this time that I am speaking of now, August or September of 1950?

A. Yes, there were.

Q. Would you proceed to explain to me what was done?

A. I examined the regulations of the Commission, to which I just referred, to determine to the best of my ability what commodities we could and what commodities we could not haul under the cer-

(Testimony of I. W. Shepherd.)

tificate which had been issued to us by the Interstate Commerce Commission.

Q. At the time you began your investigation, did you have any knowledge as to whether or not the regulations in the past, particularly the sections 73.5 and following, contained any reference to the words "dangerous", "less dangerous" and "relatively safe"? Had you had that knowledge?

A. Yes.

Q. What did you find when you undertook your investigation at this time, that you now are speaking of?

A. I found that regulations had been issued superseding and cancelling those particular sections.

Q. Did you take the matter of the interpretation of your certificate up with legal counsel or others? [264] A. I did.

Q. With whom did you take it up?

A. Mr. William B. Adams, attorney at law, Portland, Oregon.

Q. Did you request of Mr. Adams an interpretation of the certificate? A. Yes.

Q. Did he undertake to define for you or could he define for you what you could or could not haul?

Mr. Collett: If the Court please, I am going to object at this time; it is calling for the opinion and conclusion of some individual, it is the province of this court to determine whether or not the violations have been committed in accordance with the evidence and the information that is on file.

(Testimony of I. W. Shepherd.)

Mr. Russell: I feel that the inquiry is material. I do think that there is an objection to the manner in which I framed my question, and I would like to withdraw it in order to put it a different way.

The Court: Surely.

Mr. Russell: Q. I would like to ask you, did you receive from Mr. Adams pursuant to that request any advice which set forth for you an opinion of counsel as to what you might or might not be allowed to haul under that certificate?

Mr. Collett: If the Court please, I object again that it is calling for an opinion.

The Court: Would you give me the substance of the [265] certificate we are discussing?

Mr. Russell: I was speaking with respect to the portions here that are involved, "except dangerous explosives." I believe I had asked the witness previously if he had inquired from counsel as to what that might mean.

The Court: Assuming he was misled, where would we find ourselves?

Mr. Russell: I think it would bear very heavily upon the question of willful and knowing character of these violations.

The Court: For that limited purpose I will allow it.

A. Mr. Adams, the same as myself, could not determine with any degree of definiteness that we could or could not haul under the term "dangerous explosives".

Mr. Russell: Q. What was Mr. Adams' advice

(Testimony of I. W. Shepherd.)

as to the course of conduct which you should pursue?

Mr. Collett: Again object, if the Court please, as to his advice, as calling for an opinion and conclusion.

The Court: The objection will have to be sustained.

Mr. Russell: Q. At about what time did you seek the advice of Mr. Adams?

Mr. Collett: I object, if the Court please; irrelevant and immaterial.

The Court: Let him fix the time, if he recalls.

A. The time was either in September or very early part of October of 1950. [266]

Mr. Russell: Q. Did your company employ Mr. Adams to file the application which is reflected in exhibit 2? A. We did.

Q. What was the purpose of the company in undertaking to file that application? What caused you to file it?

Mr. Collett: Well, I object, if the Court please; the document speaks for itself. The language there —it is an application for an extension of their authority and it is in evidence.

The Court: We are not here——

Mr. Russell: Well, if the Court please, with some familiarity with the forms which the Interstate Commerce Commission provides for filing applications, I suggest that I should be allowed to inquire somewhat further, perhaps, if not in this way, in some other way, to develop the purpose of

(Testimony of I. W. Shepherd.)
the application. It is after all a printed form that we are required to fill in and so much space, and I think I should be—it is pertinent to this proceeding on the willful or knowing element, as to why this application was filed.

The Court: Well, we went so far afield on both sides of this case, I will allow it in the interest of time. He may answer.

A. Well, I stated at the outset of that case, in my testimony, I think very explicitly, the reasons for filing that application. [267]

Mr. Russell: Q. Did you testify in that proceeding?

A. I testified in that proceeding. [268]

* * * *

I. W. SHEPHERD

resumed the stand.

Mr. Russell: The Court will recall that just prior to the recess I was about to read certain restricted portions from the transcript. I will read from a copy, so that counsel can follow with the original. I am referring to page 16 of the transcript in the matter of docket No. M.C.55905, Sub 34, date of April 26, 1951. This is question——

The Court: This was what, an application for whom?

Mr. Russell: The application before the Interstate Commerce Commission, the documents, part of the documents of which are the subject of exhibit 2.

The Court: And the date?

(Testimony of I. W. Shepherd.)

Mr. Russell: The date of the testimony is——

The Court: Before this action was brought?

Mr. Russell: Was before this action was brought.

The Court: In anticipation of this action?

Mr. Russell: If you will recall, if the Court please, it is the application that was filed in October of 1950. The hearing was actually held, in order that the Court may have the full picture,—it was set for hearing by coincidence, I am [270] sure it is just a matter of coincidence, because the Commission sets those, between the first time that Mr. Harrison called at our office and the second time that Mr. Harrison called at our office and the second time, just shortly prior to the second time. So that the Court may have the sequence of events. But the application was originally filed in October of the previous year.

Mr. Collett: Well, if the Court please, I am going to object. It seems to me the witness is here, this is testimony of this witness. I don't see——

The Court: Well, what are you objecting to, because the Court made an inquiry?

Mr. Collett: The Court made an inquiry?

The Court: Yes.

Mr. Collett: Well, I don't understand the Court has inquired as to the contents of the transcript.

The Court: No, I wanted to know what led up to this hearing.

Mr. Russell: He was asking——

Mr. Collett: Well no, there hasn't been any question. I submit, if the Court please——

(Testimony of I. W. Shepherd.)

The Court: There is nothing before the Court at all. Let's proceed.

Mr. Russell: I was trying to give the dates from Exhibit 2. The questioning is by Mr. Adams and this is the question—the witness on the stand, and the transcript, a portion from [271] which I am reading, is from the testimony of Mr. Shepherd:

"——

Mr. Collett: Well, now, if the Court please, I am going to object to this as putting into evidence something that there is no——

The Court: He says it is two pages. I indicated to him before recess that I would give him a record on it.

Mr. Collett: Yes. Let the record show I am making my objection.

The Court: Let the record so show.

Mr. Collett: Very well.

Mr. Russell: (Reading):

"Q. Now what motivated or what caused the filing of this application?

"A. Requests from various shippers, primarily military installations, to provide service over our routes, was one of the reasons. Another one of them was our desire to clarify our operating authorities, enable us to know what we could transport and where, and eliminate the confusion amongst our own employees as to what could be handled and what couldn't be handled."

There follows then a series of objections, and then I am turning——

(Testimony of I. W. Shepherd.)

Mr. Collett: Well, at this time I will move to strike [272] that as being wholly irrelevant and immaterial, whether or not an employee was confused or not. It is self-serving, it is irrelevant, it is immaterial.

The Court: This testimony, as I remember it, is going in limited to the element of willfulness, and for that purpose only. Proceed.

Mr. Russell: The next portion to which I direct attention is on page 44 and 45 of the transcript, the cross-examination of Mr. Shepherd by a Mr. Schaeffer?

The Court: Who is Mr. Schaeffer?

Mr. Russell: He was the attorney representing a competing motor carrier.

The Court: All right.

Mr. Russell: (Reading):

"Q. Now your company is a party to the American Trucking Association——"

Mr. Collett: That is line 14, is it not?

Mr. Russell: My copy is not lined. Is line 14 correct, sir?

"Q. Now your company is a party to the American Trucking Association's explosive tariff, is it not?"

Mr. Collett: Page 44, line 14.

Mr. Russell: Thank you.

"A. It is.

"Q. And doesn't that tariff list all types [273] of explosives and identify those that are classified as dangerous explosives?

(Testimony of I. W. Shepherd.)

"A. Not in that terminology.

"Q. Well, what terminology is used?

"A. The classification defines explosives A, B, and C explosives. The classification also provides under rule 73.51 for the non-acceptance and non-transportation of certain explosives, those that are defined as forbidden explosives. It provides under rule 73.52, or names in there, those explosives which are acceptable explosives, defines Class A, Class B and Class C explosives; Class A explosives as being detonating or otherwise a maximum hazard; Class B explosives as being flammable hazard; and Class C explosives as a minimum hazard. It does not use the word 'dangerous explosives' anywhere in that definition, and we frankly don't know whether the dangerous explosives are the explosives that are the forbidden explosives, whether they are A, B, or C explosives, or whether they are all three.

"Q. Well, what does it say in connection with the forbidden explosives? Doesn't it say that no motor carrier is authorized to handle such explosives over the highway?

"A. That's right, and we have not handled any of them, [274] the following classification of forbidden explosives.

"Q. Well, what is there about that that bewilders you? Do you think that you are trying to handle forbidden explosives?

"A. No, no, what we want to know is what we can handle, among other things, and to be very

(Testimony of I. W. Shepherd.)

sure that what we do handle we are authorized to handle."

That concludes near the bottom of page 45, counsel. I realized that there is something, somewhat related here, but I had intended to cut off there because I thought we were getting into the question then of the interpretation by the witness of these classifications, rather than something that might be said to go to the matter of serious intent and willfulness. If there is anything further along this line, you would like me to continue with——

Mr. Collett: No, I don't want you to continue.

Mr. Russell: Mr. Shepherd, I would like to ask you first of all, at the time the particular shipments which are the subject of the counts of the information here actually moved, did you have any direct personal association with those particular shipments to your specific recollection at this time? A. No.

Q. Were you generally at that time in charge and regulating the matters of the traffic department covering the handling of government traffic as well as other traffic? [275] A. Yes.

Q. Let me ask you, sir, in the course of your company's business over the period of since 1945, you have been with them, is that correct, sir?

A. Since 1944.

Q. 1944. Has your company handled military traffic on government bills of lading for the government with some frequency? A. Yes.

Q. Can you tell me whether or not, from your

(Testimony of I. W. Shepherd.)

knowledge of the manner in which government traffic is handled, whether there are ever occasions when the government bill of lading does not accompany the traffic? A. Yes.

Q. What circumstances give rise to that condition?

Mr. Collett: Well, I object, if the Court please; that is immaterial and irrelevant, it is a general question, there is no relation to the matters at issue here.

Mr. Russell: Well, if the Court please, counsel is asking us——

The Court: Does a bill of lading go with the shipment?

Mr. Russell: That is what I am asking, whether there are times when it does not. Counsel's whole case is predicated upon the fact that we have copies certain words from a bill of lading that he hasn't produced, and then seeks to charge us with the fact that we actually hauled the merchandise. Now I [276] am simply seeking to show, find out from this witness, if as a matter of practical fact there are times when that bill of lading doesn't go with the shipment at all.

The Court: Lay the foundation for it. I will allow it. The objection will be overruled.

Mr. Russell: Q. The question was, what gives rise to that situation, if you know?

A. When shipments——

Mr. Collett: Well, the question was what gives rise to that situation.

(Testimony of I. W. Shepherd.)

Mr. Russell: Well, I will withdraw that question and ask it this way:

Q. Under what circumstances——

The Court: Does not a bill of lading accompany.

Mr. Russell: Q. (Continuing)—does the bill of lading not accompany——

A. When a shipment will originate with a carrier preceding the handling by our line, it is not infrequent that the copies of the bill of lading which are tendered to the originating carrier are retained in the files of that originating carrier, with the result that the only documents which we receive are copies of the originating carrier's freight bill. It is also not infrequent that the issuing officer of that bill of lading at the shipping installation will take copies of the bill of lading and put those bills of lading in a sealed envelope to [277] move forward with the shipment as an attachment to the carrier's freight bill, to be opened only by the——

The Court: Forwarding?

A. (Continuing) ——forwarding with the documents of the carrier, to be opened, that envelope to be opened only by the receiving installation. So that he has a copy of the bill of lading issued at the origin station to check the merchandise as it is received at the destination.

Mr. Russell: Q. Let me ask you, sir, when the bill of lading does accompany the shipment without being in a sealed envelope, if that is what is in the envelope, does it ever happen that the physi-

(Testimony of I. W. Shepherd.)

cal document that the originating carrier may have in his possession is in the custody and possession of the driver of the vehicle?

Mr. Collett: I object, if the Court please, that, has it ever happened, that this is all irrelevant.

The Court: Does an absence of the bill of lading from any of these—is there any reference to that in the counts?

Mr. Collett: There is no reference to any count here, if the Court please. He says if it ever happens.

Mr. Russell: I was inquiring—the question, of course, of this witness is, and I think the Court recognizes it is very difficult to tie down specific items when I have already pointed out through this witness that there are many thousands handled.

The Court: Let me inquire, is there an absence of the [278] bill of lading on any of these counts alleged?

Mr. Russell: Well, so far as the record shows, there is none at all. I was about to go into one which has been called to my attention, because of certain letters, where I have found that to be the case, and I will inquire into that at this point.

Mr. Russell: Q. I call your attention to exhibit No. 5, count No. 3, Mr. Shepherd, particularly to a letter or a copy of a letter which is attached to that exhibit, and ask you whether or not during the course of this proceeding you, at my request, made some effort to find the original ship-

(Testimony of I. W. Shepherd.)

ping documents with respect to that particular shipment. A. I did.

Q. Did you cause an investigation to be made for the documents? A. I did.

Q. Have you been able to locate certain of them?

A. I have.

Q. I call your attention, Mr. Shepherd, to four sheets of paper here and also ask that you direct your attention to exhibit No. 5, in the upper right hand corner, where some numbers appear, WV3 and so forth. Would you read those?

A. WV3045106/5.

Q. Do you know what that, on your freight bills, is designed to indicate?

A. That is designed to indicate the government bill of lading numbers or numbers. [279]

Q. I show you the document before and call your attention—to which attention is directed, and ask you whether or not to the best of your knowledge that represents the government freight bill coming into your possession bearing that same serial number or one of them, involved in exhibit 5.

A. This is the shipping order copy of the government bill of lading, No. WV3045105.

The Court: Does that cover this 3?

Mr. Russell: It covers the part, if the Court please; I was just going to develop that. It is a part of the total number of documents that are shown on the bill, not the specific item that is the subject of the count. That was the purpose of offering it.

(Testimony of I. W. Shepherd.)

Q. I would like to call your attention now, sir, to certain other documents that appear to be on a heading of Wells Cargo and ask you if you would explain what those are.

A. They appear to be an original bill of lading issued by Wells Cargo, Inc.

Q. And who is Wells Cargo, Inc.?

A. They are the connecting motor carrier of West Coast, between Herlong, California and Oakland, California.

Q. With respect to that document, are both of the government freight bill numbers shown on their document?

A. They have two bills of lading, one of them shows bill of lading number covering the bill of lading, the shipping order [280] copy of the bill of lading, which I am holding; the other bill of lading covers government bill of lading WV3045106, which I do not have.

Q. Were you able to locate that copy?

A. No, sir.

Mr. Russell: At this time I would like to offer in evidence as defendant's first exhibit in order the series of documents.

The Court: For what purpose?

Mr. Russell: For the purpose of establishing, if the Court please, the fact that the ability or the reliability of depending upon the shipping document cut by the defendant at Oakland is not the final proof of the fact of transportation.

The Court: What is in these documents that has any relation to No. 3, counsel?

(Testimony of I. W. Shepherd.)

Mr. Russell: They are, the last document of Wells Cargo, undertakes to describe by giving the 106 docket number, 14 pallets of rocket ammunition, the remainder of the documents, the actual government bill of lading for which we have, does not anywhere mention the transportation of the products which are the subject of the count of the information.

The Court: Well then, what relation has it to this count?

Mr. Russell: My purpose is, if the Court please, to establish, as I say—I submit that the government here is depending wholly in this case upon a course of business situation, if I [281] may put it that way, and they are going farther than that; they are not relying on the government documents, they are undertaking to rely on a document which we have prepared, and I have developed from Mr. Harrison and counsel has developed to some extent from Mr. Strock the fact that sometimes those documents come from other persons.

The Court: Show me where it has the language that has to do with firearms.

(Witness indicated to Court.)

The Court: In this document?

The Witness: Your Honor, this document does not describe the fourteen boxes of rocket ammunition with which the information is charged. You will find that described on this document (indicating).

(Testimony of I. W. Shepherd.)

The Court: Where? Where is the description? Oh, rocket—I see. (Reading under breath.)

The Witness: That is an abbreviation for the word "ammunition", Your Honor.

The Court: I think that is notice, myself; however,——

Mr. Russell: Well, if the Court please, I am offering this, as I have tried to keep clear,—I have two problems, and one is of notice and the other one of the proof of the physical fact of transportation.

The Court: Yes, I see.

Mr. Collett: I object.—Excuse me. [282]

The Court: Is that all from this witness?

Mr. Russell: No, I had one or two further questions, if I might.

The Court: Very well.

Mr. Russell: Q. Mr. Shepherd, was the document received—excuse me. Was the document received, if the Court please? I wasn't sure I understood. Was the document received?

The Court: Let the record so show. It may be marked.

The Clerk: Defendant's exhibit A.

(Whereupon document referred to above was received in evidence and marked defendant's exhibit A.)

Mr. Collett: I will note an objection for the record, if the Court please.

The Court: It is admitted over your objection.

(Testimony of I. W. Shepherd.)

Mr. Russell: Q. You have mention, Mr. Shepherd, that there are times your company receives papers accompanying a shipment, or a sealed document or a sealed envelope accompanying shipments. Can you tell me whether or not during the period with which we are here concerned it was the practice to make some notation of an attachment at that time? A. Yes.

Q. I show you government's exhibit No. 16, particularly calling your attention to the word "attachment" appearing at the bottom portion of the first page. Could you tell me, sir, is it possible under your procedures that that could refer to [283] an envelope? A. Yes.

Mr. Collett: Well, if the Court please, I am going to object to that as all irrelevant and immaterial. The thing on the bill that is charged is a particular commodity, which is either an A or a B type of explosive. That is the matter which they are charged with notice of.

The Court: The objection is sustained; the answer will have to go out.

Mr. Russell: Q. Mr. Shepherd, some questions were asked of Mr. Harrison yesterday in which he mentioned the fact that certain payments were accomplished according to his advice through an organization known as Transport Clearings. Can you tell me what is Transport Clearings?

Mr. Collett: Objection, if the Court please; irrelevant and immaterial at this time.

The Court: The objection will be overruled. I want to know myself what it is.

(Testimony of I. W. Shepherd.)

A. Transport Clearings is a corporation that has been organized by numerous motor carriers for the purpose of collecting freight bills, charges on freight bills. We are members and stockholders in Transport Clearings, and on a daily basis we sell——

The Court: Like a clearing house?

The Witness: That's right, Your Honor. [284]

Mr. Russell: That is the explanation.

The Court: What relation has that to the issues?

Mr. Russell: I was about to ask whether or not government bills of lading are submitted for payment through Transport Clearings.

The Witness: They are.

Mr. Collett: Objection, if the Court please; irrelevant.

Mr. Russell: Well, if I might——

The Court: Let the question and answer stand. Let's get through.

Mr. Russell: Q. Do you have—do you receive payment from Transport Clearings prior to the time that the government actually pays?

Mr. Collett: Objection, if the Court please, on the same ground.

Mr. Russell: My only purpose, if the Court please, is that certain of the counts have attempted to prove payment of transportation by showing it received from Transport Clearings, and my purpose here——

Mr. Collett: Well, is there any question that—it has been admitted they were paid for all the

(Testimony of I. W. Shepherd.)

counts. The information is obtained from your own records. There is no question they were not paid for then, is there?

Mr. Russell: I will not press the matter unduly. I don't think it is—— [285]

The Court: It is remote anyway.

Mr. Russell: Q. Mr. Shepherd, just one further question and I would like to ask you, sir, based on your experience for some twelve years in the handling of matters for motor carriers and the experience you related to me and to the Court earlier, do you know what the word—do you know what the word "dangerous explosives" in your certificate means as defined by the Commission?

Mr. Collett: Now, objection, if the Court please. That is a matter that this Court is going to——

The Court: I don't think I will have any difficulty in the interpretation of explosives or dangerous explosives. I am going to be frank with you.

Mr. Russell: Yes.

The Court: I tried to indicate that a day or two ago. Now this witness can't define that any better than the Court itself.

Mr. Russell: I appreciate that. The reason I was raising it, again goes back to my motion that I argued to some extent yesterday, simply that I was trying to develop a point that here was a point where expert minds could differ, and it was one of the things that the Court shouldn't undertake to decide, it should leave that to the Commission.

(Testimony of I. W. Shepherd.)

The Court: You wouldn't have to have any difficulty in making a determination of what dangerous explosives are, would you? [286]

The Witness: Insofar as——

The Court: I mean in relation to your shipping activity.

The Witness: Yes, Your Honor, I would.

The Court: In what respect?

The Witness: In respect of the definition that the Interstate Commerce Commission fails to carry in their regulations.

The Court: Well, they got them in the classifications, haven't they?

The Witness: Well, Your Honor, as I read their classification, they have not defined—they do not currently carry a definition of dangerous explosives as such, as the wording——

The Court: I am going to be frank with you. That is sufficient for the Court.

Mr. Russell: That is all I have. You may inquire, counsel.

Mr. Collett: Just a couple of questions.

Cross-Examination

Mr. Collett: Q. Mr. Shepherd, is there any doubt in your mind as to what trailers should have the placard called for in Section 77823 of Title 49, the Code of Federal Regulations, the placard with the term "explosives" on it?

A. No, there is no doubt in my mind.

Q. No doubt in your mind. Is there any doubt

(Testimony of I. W. Shepherd.)

in your mind as to the trailers that should have the placard with the term "dangerous" on it?

A. No. [287]

Mr. Collett: No further questions, if the Court please.

The Court: Step down.

Mr. Russell: That's all.

(Witness excused.)

Mr. Russell: That concludes the presentation of the defendant. Defendant rests. [288]

* * * * *

The Court: Now what counts are left?

Mr. Collett: 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19 and 20.

The Court: How many is that?

Mr. Collett: Thirteen.

The Court: That's a lucky number now. You will have to go forward and defend your position over in the Circuit Court. What is this, a mandatory fine, or what is it?

Mr. Collett: Maximum fine is $100 per count, if the Court please, under Section 22.

The Court: And there seems to be nothing for the Court to do but impose that fine.

Mr. Russell: If Your Honor please, I would like respectfully to request a stay of execution for a reasonable period of time in order that we might present the matter.

The Court: What time do you wish?

Mr. Russell: Five days, I think, if the Court please.

The Court: Agreeable?

Mr. Collett: Agreeable, if the Court please.

The Court: Stay of five days. It will go over —I will impose the fine now and put it over until what day, Mr. Clerk?

The Clerk: April 24 for execution. [303]

The Court: Is that agreeable?

Mr. Russell: Yes, and might I understand, so that I am familiar with the procedures of the Court, if we make the remittance to the Clerk in the intervening period, if it will be unnecessary to appear?

The Court: It will be unnecessary to appear.

Mr. Russell: Yes, thank you.

[Endorsed]: Filed May 22, 1952.

[Endorsed]: No. 13,403. United States Court of Appeals for the Ninth Circuit. West Coast Fast Freight, Inc., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 28, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13,403

WEST COAST FAST FREIGHT, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF APPELLANT'S INTENDED POINTS ON APPEAL

To the Honorable United States Court of Appeals for the Ninth Circuit:

The appellant hereby states that the following are the points upon which the appellant intends to rely on appeal:

I.

That the judgment as to each of the counts of the information is contrary to law in that the Court undertook to make an independent finding of fact as to the meaning of the words "except dangerous explosives" as used in the certificate of public convenience and necessity issued to the appellant by the Interstate Commerce Commission contrary to established rules of law that the primary jurisdiction to define said words is in the Interstate Commerce Commission of the United States.

II.

That the Court committed prejudicial error in holding that the appellant transported dangerous

explosives without there being in force as to the appellant a certificate of public convenience and necessity therefor by reason of the fact that the words "except dangerous explosives" as used in the certificate of public convenience and necessity issued to appellant by the Interstate Commerce Commission are words used in a special and technical sense and the evidence fails to establish that, at the time the alleged transportation was performed, said words had been defined either by statute or by any regulations or decisions of the Interstate Commerce Commission with sufficient certainty to put the appellant on notice of its required conduct with respect to the transportation of explosive articles so that its actions in transporting explosive articles could form the basis of a criminal offense.

III.

That the evidence fails to establish a criminal offense beyond a reasonable doubt as to any of the counts of the information in that the evidence fails to establish that the merchandise allegedly transported by appellant as set forth in the several counts of the information were in fact "dangerous explosives" as those words are used in the certificate of public convenience and necessity issued to the appellant by the Interstate Commerce Commission.

IV.

That the trial court committed prejudicial error by receiving in evidence over the objection of appellant Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18,

19, 21, and 22, offered by the United States in that: (a) said exhibits were hearsay as to the appellant;

(b) no proper foundation was laid by any competent evidence for the introduction of said exhibits;

(c) no proper foundation was laid by competent evidence to establish that the appellant had, or should have had, any knowledge of the facts recited in said Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22.

V.

That the trial court committed prejudicial error in denying the motion of the appellant to strike from the evidence Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22 at the conclusion of the evidence presented by the United States in that:

(a) said exhibits constituted hearsay as to the appellant;

(b) no proper foundation was laid either before or after the receipt of said exhibits by competent evidence for the receipt of said exhibits in evidence;

(c) no foundation was laid either before or after the receipt of said exhibits to establish that the appellant had or should have had knowledge of the facts recited in said Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22;

(d) the evidence affirmatively showed at the time of said motion that appellant could not have known the truth or falsity of the facts recited by said exhibits.

VI.

That the judgment of the Court is unsupported by the evidence in that the evidence fails to establish

as a fact that the appellant did physically transport any of the commodities described in counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19, or 20 of the information.

VII.

That the judgment of the Court is unsupported by the evidence in that the evidence fails to establish that any of the commodities described in counts 1, 2, 3, 4, 9, 12, 13, 14, 15, 16, 17, 19, and 20 of the information were transported willfully and knowingly by appellant even if said commodities were in fact actually transported.

Dated: June 10, 1952.

GLANZ & RUSSELL,
/s/ By THEODORE W. RUSSELL,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 12, 1952. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

To the Honorable United States Court of Appeals for the Ninth Circuit:

It is hereby stipulated by and between the United States of America, appellee herein, by its attorney Chauncey Tramutolo, United States Attorney for the Northern District of California and West Coast Fast Freight, Inc., appellant herein, by its attorneys Glanz & Russell, by Theodore W. Russell, as follows:

I.

That the parties hereto hereby waive the necessity for printing the exhibits introduced in the within action and agree that the originals of Exhibits 1, 2, 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, 22, 23, and 24 introduced by the United States and Exhibit A introduced by the defendant may be considered by the Court in the determination of the within action on appeal the same as though each of said exhibits had been made a part of the printed record on appeal.

II.

That each of the exhibits described in Paragraph I hereof shall be considered as a part of the record on appeal.

Dated: June 10, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney for the Northern District of California, Attorney for Appellee.

GLANZ & RUSSELL,
/s/ By THEODORE W. RUSSELL,
Attorneys for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.
/s/ WILLIAM HEALY,
/s/ WM. E. ORR,
United States Circuit Judges.

[Endorsed]: Filed June 16, 1952. Paul P. O'Brien, Clerk.

No. 13403

United States
Court of Appeals
For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Brief of Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division

GLANZ & RUSSELL
639 South Spring Street
Los Angeles 14, California
Attorneys for Appellant.

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United States
Court of Appeals
For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., a corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13403

Brief of Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

The action arises on a criminal information brought by the United States of America charging in thirteen counts the transportation in interstate commerce on a public highway of property without there being in force with respect to the defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The Statutory provisions declaring

such action to be an offense against the laws of the United States are contained in the Interstate Commerce Act, Part II, (49 U.S.C.A. §306(a) and 49 U.S.C.A. §322). The jurisdiction of the District Court arises by virtue of the foregoing statutes and 18 U.S.C.A. §3231. The jurisdiction of the Circuit Court of Appeals arises by virtue of the provisions of 28 U.S.C.A. §1291. One of the issues raised on appeal in this action is the propriety of the action of the District Court in proceeding to final determination of the action in view of the so-called "primary jurisdiction" doctrine first announced by the United States Supreme Court in *Texas & Pacific Railway Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907).

II.

STATEMENT OF THE CASE

a. General factual information giving rise to the issue.

Appellant has for some years held a certificate of public convenience and necessity authorizing the transportation of property in interstate commerce as a motor carrier issued to it by the Interstate Commerce Commission. (Exhibit 1.) Included in this authority is an authority to transport "commodities generally, . . . except dangerous explosives . . . " between, among other places, Oakland and San Francisco, California, and points in Oregon and Washington. (Ex. 1, Tr. 29-31.)[1]

[1]References are to page of the Transcript of Record on Appeal, and to the Exhibits which are a part of the Record on Appeal by stipulation.

Shortly prior to September, 1950, appellant submitted to the United States Government through the Office of the Chief of Transportation at Washington, D. C., quotations for the transportation of freight for the government over the lines of the appellant. (Tr., 182-184.) With these quotations were submitted copies of the certificate of public convenience and necessity held by appellant. (Tr. 182-184.) Shortly following this action, and prior to September, 1950, the U. S. Government Sierra Ordnance Depot at Herlong, California, began routing traffic over appellant's lines. (Tr. 182-183.) Herlong, California, is approximately 40 miles northwest of Reno, Nevada, and is not a point served by appellant. (Tr. 47, Ex. 1.) Shipments coming from this point which form the basis of the several counts of the complaint were transported from Herlong, California, to Oakland or San Francisco, California, via the lines of Wells Cargo, Inc., a connecting motor carrier. (Tr. 200-201.) At Oakland or San Francisco, California, the freight was turned over to the defendant for transportation beyond to Oregon and Washington points. (Tr. 47.) The transportation of all or a part of the items comprising 13 such shipments by the appellant from these California points to points in Oregon and Washington form the basis of the counts of the information which form the basis of the appeal.

b. Statement of the questions involved and the manner in which they are raised.

There are three basic questions raised on the appeal. The first is the propriety of the action of the District Court in admitting into evidence certain exhibits and of denying a subsequent motion to strike such exhibits from the record. The admissibility of the documents was placed in issue by objection of the defendant seasonably made. (Tr. 35-43, 44-45.) The documents were also the subject of a motion to strike. (Tr. 150-155.)

The second basic issue is the sufficiency of the evidence to establish (a) the character and dangerous properties of the merchandise allegedly transported, (b) the sufficiency of the evidence to prove the fact of transportation of a "dangerous" commodity, and (c) the sufficiency of the evidence to establish the "willful" character of appellant's acts. This issue was raised by a motion for acquittal and is now raised by appeal from the final judgment. (Tr. 149.)

The third basic issue is the jurisdictional question of the applicability of the so-called "primary jurisdiction" doctrine to the fact situation here presented. This issue was presented in the form of a motion to dismiss or for acquittal as the Court might deem proper at the conclusion of the case of the United States. (Tr. 149.) The essence of this issue is that the words "except dangerous explosives" as used in the certificate of the appellant are words used in a technical and special sense requiring a determination of special meaning as

a matter of fact; that, under the "primary jurisdiction" doctrine, the meaning of that term as used in appellant's certificate must be fixed by the Interstate Commerce Commission in the first instance.

c. Summary of the evidence directly related to the issues raised on appeal.

An effort will be made in the summary of the evidence to bring together under separate subject heading the evidence with respect to each of the basic issues. In some instances the same evidence pertains to more than one issue. Duplications of statements will be avoided so far as it is possible to do so.

1. The evidence relating to the admissibility of the exhibits and their relevancy.

The sole witness called by the United States was Mr. William L. Harrison, an attorney employed by the Interstate Commerce Commission, Bureau of Motor Carriers. (Tr. 17.) Mr. Harrison's testimony was based upon two investigations made by him at the general offices of appellant in Seattle, Washington, about March 15 and May 1, 1951. (Tr. 50.) On these visits Mr. Harrison talked with a Mr. Gottstein and Mr. Castellano. (Tr. 71.) Mr. Gottstein was a file clerk in charge of government traffic. (Tr. 71.) Mr. Castellano was an employee of the appellant in charge of certain trip report records. From Mr. Gottstein the witness Harrison secured photostatic copies of freight bills taken from the files of the appellant. (Tr. 34.) These photostatic copies are Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22 (hereafter in this brief referred

to collectively as Exhibits 3-22 inclusive in the interest of brevity). Exhibit 4 includes also a correction freight bill and a copy of a government bill of lading. (Tr. 45-47.) No question is here raised by virtue of the fact that the exhibits are photostatic copies. (Tr. 32.)

Mr. Harrison made certain notes from his examination of the trip reports and testified in the proceeding as to the movement of vehicles from those notes. (Tr. 54, 55.) These trip reports consist simply of a driver's record of vehicle movement in terms of time and place. (Tr. 53.) They do not reflect any information with respect to the goods transported. (Tr. 70.)

Mr. Harrison's information as to Exhibits 3-22 inclusive was based entirely upon such data as he derived from the face of the document and from statements to him by Mr. Gottstein. (Tr. 71, 50-51.) Mr. Gottstein's information was likewise derived exclusively from the face of the exhibits. He had no personal knowledge of the facts therein reflected. (Tr. 71, 50-51.)

With one exception Mr. Harrison did not examine any of the bills of lading which may have been issued by the government with respect to the shipments involved. (Tr. 123.) He did examine the bill of lading which constitutes a part of Exhibit 4. (Tr. 123.) At the time of the investigations, in the spring of 1951, such copies of bills of lading as might have come into the possession of the appellant had apparently been forwarded to the government in connection with the claim for payment of charges. (Tr. 123.)

The only evidence produced by the United States prior to the offer of the documents in evidence and to the motion to strike relating to their source or their preparation was the statement of Mr. Harrison that the documents were secured from the files of the appellant and that appellant, as a carrier, is required to make freight bills covering its transactions. (Tr. 32, 34.)

The testimony of witnesses for the defendant throws some further light upon the source of these documents. Freight bills of the type involved are generally prepared by the traffic department of the originating station. (Tr. 179.) This traffic department operates under the general supervision of the traffic department in Seattle, Washington. (Tr. 171.) The general manager of the Oakland terminal of appellant indicated that, to the best of his knowledge, the information appearing on the freight bills comprising Exhibits 3-22 inclusive was taken from freight bills of Wells Cargo, Inc. (the originating carrier) or from the government bill of lading. (Tr. 160-161) These matters, however, were not under his supervision or direction. (Tr. 169, 171.) The general traffic manager of appellant (Mr. Shepherd) under whose direction the issuance of such documents came, indicated he was not personally familiar with any particular shipments involved, but did indicate that with some frequency his company did not have access to the government bills of lading either because they did not accompany the shipment or because they were presented under seal so as to prevent examination. (Tr. 198.)

As a result of these circumstances the freight bills on government traffic were sometimes cut either from information on the bill of lading of the originating carrier or the freight bill of that concern. (Tr. 198.)

It should be noted in this connection that Exhibit 5 and appellant's Exhibit A reflect a situation in which it appears that two government freight bills were involved. Only one of these appears to have reached the appellant, at least so far as its records reflect. (Tr. 200-201.) This bill does not reflect the commodity which is the subject of the complaint (Count 3). The only document reflecting this item is a document purporting to be a bill of lading of the originating carrier. (Ex. A, Tr. 200-201.) As to what the facts may be with respect to the specific source of information contained in Exhibits 3-22 inclusive (other than Exhibit 5) the record is silent.

The record reflects that it was the custom and practice of the appellant on ordinary commercial shipments to check the commodities loaded on vehicles against the bill of lading for that shipment. (Tr. 170.) The freight bill is cut only after this check has been completed. (Tr. 170.) All of the shipments which are involved here came to the appellant in vehicles sealed by the government. (Tr. 117, 157.) No member of the appellant's organization was given any opportunity to check the contents of the vehicles against any shipping documents because of the fact that the appellant was not permitted to break the government seals. (Tr. 169-170.)

2. The substantive evidence with respect to the elements of the several offenses.

To establish what was actually in the particular trucks of the appellant the United States relies entirely upon Exhibits 3-22 inclusive. Except as to Counts 2 and 3, the documents consist solely of copies of freight bills. As to the two counts the evidence reflects also copies of bills of lading either of the government or of the initiating carrier. (Ex. 4, Ex. 5, Ex. A.) The only other evidence pertaining to the movement of appellant's trucks is testimony of Mr. Harrison relating to information obtained from certain trip reports. These reports do not reflect any information as to what was in the trucks. (Tr. 70.)

These trucks all came to the defendant physically sealed so as to prevent examination and direct knowledge of the contents. (Tr. 169-170.) They were received by the appellant from another motor carrier who in turn received them in a sealed condition from the government authorities at Herlong, California. (Tr. 125.) We know that as to two of the counts a bill of lading was prepared either by the government or by Wells Cargo, Inc., describing the commodity in a certain fashion. (Ex. 4, Ex. A.) Beyond this there is no direct evidence as to what was the source of the information on the freight bills. Mr. Harrison did not compare these freight bills with any bills of lading (other than as to Ex. 4.) (Tr. 123.) The evidence is entirely silent as to the source of information with respect to the commodity as to the initiating carrier. No

witness was called by the United States to testify to any facts with respect to the actual loading of these vehicles or to the practice of loading. No evidence is shown of the procedures followed by the government in determining the description of the commodity. Beyond the description by class in the Exhibits there is no evidence of what the particular products may have been.

To prove that the commodities transported were explosives and that they were dangerous the United States relied again exclusively upon documentary evidence. Mr. Harrison was not an authority on explosives. (Tr. 101.) Exhibits 23 and 24 were introduced for the purpose, among others, of proving the explosive and dangerous character of the commodities. It was agreed between counsel that these exhibits reflected in substantial form regulations promulgated by the Interstate Commerce Commission appearing in the Federal Register pursuant to the provisions of an act governing the transportation of explosives and other dangerous articles (18 U.S.C.A. §835). (Tr. 68-86.) The exhibits also constitute a tariff to which the appellant is a party to the extent of its authorization. (Ex. 23, Ex. 24.) As to the matter of the definitions of the characteristics of the different items described in the freight bills, Exhibit 23 represented the effective regulations at the time the transportation was performed. (Tr. 88-91.) The effective date of these regulations as shown by the Federal Register was May 3, 1950. (Tr. 90.) Exhibit 6 represents a state-

ment of the regulations in effect prior to that date. (Tr. 90-91.)

It will be necessary in the course of the argument to discuss certain portions of Exhibits 23 and 24 in some detail. To avoid duplication of statement appellant here simply calls attention to the fact that the portions of Exhibit 23 undertaking to define and classify explosives of various categories are contained in Sections 75.50 through 73.109 appearing on pages 35 to 46, inclusive, of the exhibit. In Exhibit 23 (the superceded regulations) the sections dealing with classification and definition appear in Sections 50 through 75 on pages 38 to 48 of Exhibit 23. 24

Comparison of the cited sections of Exhibits 23 and 24 will reflect some rather substantial changes both in terminology and definition as well as in the pattern of classification. In Exhibit 23 explosives are divided into two classes, i.e., forbidden explosives (§73.51) and acceptable explosives (§73.52). The latter type is further subdivided into three classes as follows: "(1) Class A explosives; detonating or otherwise of maximum hazard; (2) Class B explosives; flammable hazard; (3) Class C explosives; minimum hazard." (Ex. 23, §73.52.) Section 73.53 undertakes to define Class A explosives. Section 73.88 undertakes to define Class B explosives. Section 73.100 undertakes to define Class C explosives. As more fully appears from these definitions whether or not a particular article falls within one classification or another as a matter of fact depends upon the reaction of the explosive material when

subjected to particular tests (generally devised by the Bureau of Explosives) (Ex. 73, 53), or to the nature of the product as being primarily combustible rather than detonating. (Ex. 23, §83.88.) In some instances the character is fixed as Class C simply because the quantity of explosive material in the given container is present in restricted quantities. (Ex. 23, §73.100).

No effort was made by the United States to introduce direct evidence as to the specific ingredients or specific explosive properties of any of the commodities allegedly transported. The United States relies entirely for the proof of the dangerous character of the articles upon the fact that certain language is used in Exhibits 3-22 inclusive and that the same or similar language appears in Exhibits 23 and 24 under the classification of an acceptable explosive Class A or Class B.

In this connection the attention of the Court is called to the fact that the language used in Exhibits 3-22 inclusive is defined in Exhibit 23 in such terms that, in each instance, the designation embraces a group or class of products having certain common characteristics. For example, "Ammunition for Cannon" as defined in Exhibit 23 embraces any "fixed, semi-fixed or separate loading ammunition which is fired from a cannon, mortar, gun or howitzer." (Ex. 23, §73.53(1).) Obviously these words could be used to describe a wide range of different specific products any one of which might have explosive properties differing from all others within the general class. The

words were not selected by appellant since it was prevented by the seals upon the vehicles from making any examination of the contents. (Tr. 125.) Who may have determined that the words used were an appropriate description by class of the specific items transported, the record does not reveal. Neither does it disclose anything with respect to the competency of the person, whoever it may have been, to make the classification in the first instance.

3. The evidence relating to the definition of the term "dangerous explosive" as used in the certificate of the appellant.

Appellant has authority from the Interstate Commerce Commission to transport between the points here involved "general commodities . . . except dangerous explosives." (Ex. 1.) The language used is that of the Interstate Commerce Commission. (Ex. 1.) Appellant urged by motion to dismiss and motion for acquittal made to the District Court that the term "except dangerous explosives" as used in the certificate of the appellant is a term used in a technical sense and as a word of art and that under the so-called "primary jurisdiction" doctrine a question of fact as to the meaning of the term exists which can be decided in the first instance only by the Interstate Commerce Commission. Considerable testimony at the trial was directed to this issue.

The District Court judge indicated during the trial: "To my mind, all explosives are dangerous." (Tr. 110.) It was the testimony of Mr. Harrison, an attor-

ney for the Interstate Commerce Commission, that the words "dangerous explosives" and "explosives" as used by the Interstate Commerce Commission in certificates were not synonymous terms. (Tr. 98.) The fact that both terms are used in different parts of the appellant's certificate bears out this statement. (Ex. 1.) It was further the opinion of Mr. Harrison that if an explosive fell under "Class C" as defined in Exhibit 23 it would not be a "dangerous explosive." (Tr. 104.) A particular item might be classified as "dangerous" at one time and subsequently changed by the change in regulations so as to be removed from that class. (Tr. 104.)

Exhibit 23 (the effective regulations) and Exhibit 24 (the superseded regulations(differ in a number of respects. In Exhibit 24, Class A, Class B and Class C exposives include in the basic classification the words "dangerous," "less dangerous," and "relatively safe" respectively. (Ex. 4, §51, p. 38.) These words were deleted in the amendment of the regulations made effective May 3, 1950. (Ex. 23, §73.52, p. 35, Tr. 90.) Substantive changes in definitions of the type of articles to be included within a particular class were also made. (Compare definition of "Ammunition for Cannon." (Ex. 23, §73.53(1) and Ex. 24, §54, as an example in point.)

Nowhere in the definition of terms in the regulations effective at the time the shipments moved is there any use of the word "dangerous" as defining a particular class or kind of explosive. (Tr. 93.) It is true that at the time the regulations described in Exhibit 24 were

in effect the Interstate Commerce Commission in a case entitled *Strickland Transportation, Inc.—Extension—Dangerous Explosives,* 49 M.C.C. 595 (1949), stated that the term "dangerous explosives" as used in a certificate should be construed to include only those explosives described as "dangerous" or "less dangerous" in the regulations set forth in Exhibit 24. (Tr. 9596.) The words used by the Interstate Commerce in the *Strickland* case were, however, deleted from the regulations by the amendment of May 3, 1950. (Tr. 88-91, Ex. 23, Ex. 24.)

Mr. Shepherd, the traffic manager of defendant for some seven years, indicated in response to questions by the Court that he had difficulty in knowing what were "dangerous explosives" within the meaning of the certificate. (Tr. 207.) Mr. Harrison, who conducted the investigations preceding the filing of the information was careful to state that any advice he gave the appellant with respect to the classification of items shipped was his personal judgment rather than an attempt to express a ruling of the Commission. (Tr. 78-79.)

To set forth fully the evidence demonstrating the lack of clarity of the language in appellant's certificate and the technical character of the fact issue which the definition of the certificate presents would require many pages. In the limits of the space allowed on Brief examples only can be cited.

In Count 17 and in Exhibit 19 the article transported is described as "Rocket Ammunition *for cannon*

with Empty Projectiles." (Emphasis added.) Section 73.53 of Exhibit 23 defines rocket ammunition as being "fixed ammunition which is fired from a tube, launcher, rails, trough, or other device *as distinguished from a cannon, gun or mortar.* (Emphasis added.) (Ex. 23, §73.53(p).) Nowhere in Exhibit 23 is any commodity described which fits the language used in Exhibit 19.

Mention has previously been made of the definition in Exhibit 23 of ammunition for cannon. In Exhibit 24, the superseded regulations, it was necessary, in order to qualify as such, that the projectile be designed for a 37 millimeter or larger weapon. (Ex. 24, §54.)

The foregoing examples give some indication of the problem of specific classification from the regulations themselves. In the course of the argument directed to the application of the "primary jurisdiction" doctrine examples related to the larger question of the sufficiency of the regulations generally as an aid to definition will be cited.

4. The evidence bearing upon the willful and knowing character of the acts of appellant in performing transportation.

Before handling any traffic of any kind from the Sierra Army Ordnance Depot at Herlong, California, appellant submitted a copy of its certificate to the appropriate military authorities in Washington, D. C. (Tr. 183.) Appellant was subsequently tendered freight coming from Herlong, California. (Tr. 185.) Included in the freight handled were many explosive

items which Mr. Harrison considered did not fall within the prohibition of the certificate. (Tr. 104-105.) When it came to the attention of Mr. Shepherd that explosive items were moving, he undertook an examination of the Commission regulations. (Tr. 188.) Finding that the regulations (Ex. 23) did not define "dangerous explosives" he sought opinion of Mr. William B. Adams, an attorney at Portland, Oregon. (Tr. 188.) Mr. Adams was unable to determine with any degree of definiteness what was included within the meaning of the term "dangerous explosives." (Tr. 189.) On October 25, 1950, an application was filed with the Interstate Commerce Commission for removal of the restrictive language from the certificate. (Ex. 2, Tr. 20-24.) The hearing before the Commission took place April 26, 1951. In this hearing Mr. Shepherd testified that the application was presented to clarify the confusing language in the certificate. (Tr. 193.)

Mr. Harrison indicated that his investigations were made in March and May respectively of 1951. (Tr. 50.) All representatives of the appellant were cooperative. No attempt at concealment of what had been done was made. (Tr. 78.) At the time of these investigations Mr. Harrison first advised the appellant that he considered the transportation improper. (Tr. 78.) Even then he expressed these thoughts as a personal opinion. (Tr. 78.) It will be noted that the last shipment reflected by the information moved on May 6, 1951. To the best of Mr. Harrison's knowledge the Interstate Commerce Commission gave no notice to the

defendant that its actions were considered improper prior to the time the information was filed. (Tr. 79.)

The issue presented is whether or not, in view of the course of conduct of appellant and the confusing status of the regulations, the appellant's conduct can be construed as willful and knowing violation of the law.

III.

SPECIFICATION OF ERRORS RELIED UPON

Number One: The judgment as to each of the counts of the information is contrary to law in that the Court undertook to make an independent finding of fact as to the meaning of the words "except dangerous explosives" as used in the certificate of public convenience and necessity issued to the appellant by the Interstate Commerce Commission contrary to established rules of law that the primary jurisdiction to define said words is in the Interstate Commerce Commission.

Number Two: The judgment as to each of the counts of the information is contrary to law in that the words "except dangerous explosives" as used in the certificate of appellant are used in a technical sense and the evidence fails to establish that at the time the alleged transportation was performed said words had been defined with sufficient certainty to put the appellant on notice that its actions would constitute a criminal offense.

Number Three: The trial court committed prejudicial error by receiving in evidence over the objection

of the appellant Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22.

The original of the several exhibits are made a part of the record on appeal by stipulation of counsel. (Tr. 213-214.) Testimony pertaining to the introduction of the exhibits appears at pages 32 to 45 inclusive of the Transcript of Record on Appeal. The ruling of the Court appears at page 45 of the transcript. The objection of counsel to the introduction of the exhibits was in the following language.

> "But I think the case is significant and does support the objection which we make here, that the documents are hearsay and that they are not the best evidence of the fact with respect to the character of the transportation." (Tr. 39.)

Further the objection was stated as follows as to all of the exhibits:

> "In order that the record may be clear, may the record show my objection on the ground of hearsay, and no proper foundation laid." (Tr. 45.)

Number Four: The trial court committed prejudicial error in denying the motion of the appellant to strike from the evidence Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21, and 22.

The exhibits are the same as those described in Specification of Errors Relied Upon, Number Three, above. The motion to strike and the ruling thereon appears at pages 153 to 155 of the Transcript of Record

on Appeal. The language of the motion as stated by Counsel for appellant is as follows:

> " . . . I therefore in accordance with the permission that was given by the Court make at this time the motion to strike Exhibits 3 through 22, both inclusive, and the testimony of Mr. Harrison, with respect to those exhibits as to anything that they may show, his testimony as to what they reflect, as being hearsay in this proceeding, incompetent, irrelevant and immaterial, and failing to establish as proper evidence the fact of transportation." (Tr. 153-154.)
>
> Also: "If the Court please, at the conclusion of my statement yesterday, just before the interruption, I had made a statement of a motion to strike in addition, the documents on the failure to establish the foundation, and on the ground that they called for hearsay under the—
>
> THE COURT: I think you covered that.
>
> MR. RUSSELL: Well—
>
> THE COURT: If you did not, I will allow you for the purpose of the record to make a general objection." (Tr. 154.)

Number Five: The judgment as to each count of the information is contrary to the evidence in that the evidence fails to establish (a) the fact as to what specific products were transported, and (b) the fact as to the dangerous explosive characteristics of such articles.

Number Six: The judgment as to each count of the information is contrary to the evidence in that the evi-

dence fails to establish that any transportation which may have been performed by appellant was "willful" within the meaning of the term as used in statutes under which appellant is charged.

IV.

ARGUMENT IN SUPPORT OF SPECIFICATIONS OF ERROR

A. The Argument Relating to the "Primary Jurisdiction" Question. (Specificaton of Error Number One).

1. Summary of the Argument.

Congress has delegated to the Interstate Commerce Commission the certification and regulation of motor carriers of property for hire. Appellant holds a certificate of public convenience and necessity issued by such Commission. This certificate as it relates to counts of the information authorizes the transportation of "commodities generally . . . except dangerous explosives." (Ex. 1.) The evidence demonstrates that the words "except dangerous explosives" as used by said Commission in the certificate of appellant are used in a technical sense and as words of art having other than a common and ordinary meaning. The meaning of these words as used in the certificate has not been defined with certainty by the Interstate Commerce Commission. There is presented, therefore, the question of fact as to what particular types and kind of explosive items fall within the meaning of the term "dangerous explosives" as used in the certificate. The

Congress has delegated to the Interstate Commerce Commission as an expert administrative agency the determination of the technical questions presented. Under the circumstances the "primary jurisdiction" to define and find as a fact the meaning of the technical term "except dangerous explosives" rests with the Interstate Commerce Commission. The District Court should not have undertaken to make the finding of fact as to the meaning of the term in the absence of a prior clear and certain definition thereof by the Interstate Commerce Commission.

2. Statement of the Argument.

Pursuant to the provisions of the Interstate Commerce Act, Part II (49 U.S.C.A. §300-327 inc.) Congress has delegated to the Interstate Commerce Commission the matter of the certification and regulation of motor carriers engaged in interstate commerce. These statutory provisions delegate to the said Commission the power and right to make classification of types of service.

Interstate Commerce Act, Part II (49 U.S.C.A. §308).

The statute in question also gives to the Interstate Commerce Commission the power to issue certificates of public convenience and necessity and to prescribe terms and conditions in connection therewith.

Interstate Commerce Act, Part II, (49 U.S.C.A. §306(a)).

The scope of the certificate to be granted to a particular carrier entails weighing of evidence and the exercise of expert judgment, a function reserved exclusively for the Commission.

See:

United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 480, 62 S. Ct. 722, 86 L. Ed. 971 (1941).

In the exercise of this function the Commission has issued to the appellant a certificate which provides, so far as pertinent here, that the appellant has authority to transport over the routes described "general commodities . . . except dangerous explosives." (Ex. 1.) Since the appellant is authorized to transport commodities generally the authority to handle and transport the items of property described in the several counts of the information exists under the certificate unless these items of property must be deemed to fall within the exception noted. (Tr. 141.) The unlawful acts, if any, do not arise from the mere fact of transportation but from the transportation of property of a particular class and kind.

The several counts of the complaint allege the transportation of the following items: Detonating fuses; explosive projectile for cannon; rocket ammunition with empty projectiles; ammunition for cannon with explosive projectiles; hand grenades; rocket ammunition for cannon with empty projectiles; and black power. These items are similarly described in the only

evidence of record purporting to establish the fact of transportation. Since the particular items described are not set forth in the certificate their transportation becomes unlawful only if it can be said that they have the physical characteristics of a "dangerous explosive" as that term is used in the certificate which the appellant holds. Inevitably, therefore, the question must first be answered, "What do these words mean?"

Pursuant to a principle of law which has come to be known as the "primary jurisdiction doctrine" first announced in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907), the United States Supreme Court has held that in situations of the general type here presented primary resort to the Interstate Commerce Commission is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission.

See:

Great Northern Railway Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1921).

The case last cited undertakes to set out and distinguish the different basic problems which are presented. Justice Brandies, speaking for the Supreme Court, points out in the cited case first of all that "it is not the character of the function but the character of the controverted question and the nature of the inquiry

necessary to its solution which requires that it be preliminarily decided by the administrative body." (*Great Northern Railway Co. v. Merchant's Elevator Co.,* supra (L. Ed. p. 946). Where words of the written instrument are used in their ordinary meaning, their construction presents a question solely of law. This function the Courts can perform without resort to the Commission.

Where, however, words are given a particular meaning it becomes necessary to determine the meaning of the words used in the document. This applies to technical words or phrases not commonly understood or to words having a trade meaning. Where such a situation arises and the peculiar meaning or particular usage is proved by evidence there must be a finding of fact as to the scope of the meaning before construction of the instrument can follow. In the latter situation "preliminary determination must be made by the Commission, and not until this determination has been made can a court take jurisdiction of the controversy."

Great Northern Railway Co. v. Merchant's Elevator Co., 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1921);

Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1914);

Director General v. Viscose Company, 254 U. S. 498, 41 S. Ct. 151, 65 L. Ed. 372 (1921);

Armour & Co. v. Alton R. Co., 312 U. S. 195, 61 S. Ct. 408, 85 L. Ed. 771 (1941);

Trans-Pacific Airlines, Ltd. v. Hawaiian Air Lines, Ltd., 174 Fed. (2d) 63, (C.C.A. 9th Circuit) (1949);

Hancock Mfg. Co. v. United States, 155 Fed. (2d) 827 (C.C.A. 6th Circuit) (1946).

In the case of *Trans-Pacific Airlines, Ltd. v. Hawaiian Air Lines, Ltd.,* supra, p. 66, this Court set forth the distinction between the situations involved as follows:

> "Where the application of the administrative regulation is clear and no special familiarity with the complicated factual situations peculiar to the field is imposed, and no determination of direction is required, the courts will proceed. (*Great Northern Railway Company v. Merchant's Elevator Company,* 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943.) On the other hand, prior to judicial intervention, problems which involve expert knowledge of multitudinous detail of intricate nature in a technical field require that recourse should be had to administrative bodies. Especially is this true where uniformity of interpretation of rules and consistency of application, in view of overall policy, is compelled by the legislative mandate. Then is there not only a commitment of primary, but likewise of exclusive, jurisdiction to the administrative, and exhaustion of the remedies is mandatory." (p. 66.)

The cited case was similar in many respects to the fact situation here presented, particularly in that it in-

volved a claim of carrier operation without appropriate certificate.

It will be helpful to examine the facts before the Court in this action in light of the language used by this Court in the quotation just made.

1. Is the "application of the administrative regulations" clear?

At the very threshold of this discussion the question is raised as to what the "regulations" are. The certificate itself may be considered to qualify in this category. Examination of the certificate reflects no amplification or explanation of the phrase "except dangerous explosives." At another point in the certificate an exception to a general commodity authority is stated "except . . . explosives, or dangerous substances." The qualifying word "dangerous" must indicate, therefore, that "dangerous explosives" and "explosives" are not synonymous terms. (Tr. 98.) The certificate itsef confuses rather than clarifies.

The United States cites certain regulations issued by the Interstate Commerce Commission as controlling. These regulations are set forth in Exhibits 23 and 24. Exhibit 23 reflects the effective regulations at the time the shipments moved. Exhibit 24 reflects the regulations as they existed prior thereto. It is to be noted that these regulations are issued by the Interstate Commerce Commission, not pursuant to its authority under the Interstate Commerce Act, *but pursuant to a special authority granted by Congress in connection with other statutes.* (18 U.S.C.A. §835.)

The regulations apply to all types of carriers and to shippers. A question therefore arises as to whether regulations issued pursuant to one statutory authority dealing with the subject of explosives can be taken as a proper basis for interpretation used in a certificate issued pursuant to another statute. Even if it is decided that these regulations can be so used, such decision is a determination of that fact which can only be made from sources other than the statutes and the regulations themselves. A different basic purpose is involved in the statute resulting in the certificate and in the statute resulting in the regulations. Different considerations may well be involved as to the classification of a particular product when the question is one simply of packaging and the manner of handling in course of transit from those involved in determining what items are safe for transportation at all. The purpose of the regulations and their statutory source prevent a declaration that the "application of the administrative regulations" is clear.

Even if it be assumed the regulations are applicable for purposes of assisting in the definition of the certificate, they are not sufficiently clear to avoid the necessity for a preliminary administrative determination.

The regulations in force at the time these shipments moved divide explosives into two categories—"forbidden" and "acceptable". Ex. 23, §73.51, §73.52.) All of the items allegedly transported by appellant are classified in these regulations as "acceptable". (Ex. 23, §73.53, §73.88.) Section 73.801 (dealing particularly

with the application of regulations to motor carriers) states in part, "Explosives and other dangerous articles, except such as may not be accepted and transported under Parts 71-78, may be accepted and transported by common and contract carriers by motor vehicle engaged in interstate or foreign commerce . . ." Section 77.822(a) also states in part, "Any motor carrier may accept for transportation or transport any acceptable explosive or other dangerous artices listed in the Commodity List, §75.5. . . ."[2]

The presence of these sections in the regulations, coupled with the division of explosives into forbidden and aceptable groups, at once raises the question as to whether or not the words "except dangerous explosives" as used in the certificate was intended simply to carry into the certificate the admonition of the regulations against the handling of non-acceptable explosives by motor carriers. At the very least, a serious question of the clarity of the application of the regulations is raised.

Even if it is assumed that the several regulations defining and classifying acceptable explosives must be considered as applicable for purposes of interpretation of the certificate, confusion still exists. Exhibit 23 setting forth the regulations applicable at the time the transportation was performed, nowhere uses the words "dangerous" or "less dangerous" in the provisions undertaking to define the several classes. (Ex. 23, §73.52, §73.53, §73.88, §73.100.) The confusion is in-

[2]For full text of Sections 77.801 and 77.822(a) see Appendix I, Item No. 1.

creased by comparison of the effective regulations in Exhibit 23 with those formerly in force as set out in Exhibit 24. The comparable sections of the last mentioned exhibit do contain the words "dangerous" and "less dangerous". Ex. 24, § 51.) They were eliminated in the changes in the regulations made effective May 3, 1950. (Tr. 90.) How can it be said that the change in langauge had no effect upon the meaning of words used in certificates without speculation upon the intent and purpose of the Interstate Commerce Commission in making the changes noted?

Even the superceded regulations indicate that there are variations in the dangerous character of explosive items (Ex. 24, §51.) Defendant has been convicted for the alleged transportation of some items which formerly fell in the "less dangerous" category. (Ex. 24, §63A.) Can it be said that the regulations are sufficiently clear to be sure that the word "dangerous" as used in the certificate was intended by the Commission to include also items described as "less dangerous"?

A detailed examination of the provisions of the several specific sections dealing with the particular items which form the basis of the information will develop additional examples to illustrate the difficulty of attempting to hold that the regulations are clear and certain as applied to the issue. It should be sufficient to mention here that comparison of Exhibit 23 and Exhibit 24 demonstrates numerous changes in the arrangement, definition and classification of the several items here specifically involved. It is respectfully

submitted that it is impossible to ascertain from the effective regulations just what is connoted by the term "dangerous explosives" as contained in the appellant's certificate.

A third possible source of a "regulation" which might determine the interpretation of the certificate is to be found in the decisions of the Interstate Commerce Commission. It would appear that there is only one decision of that body which might possibly so qualify. (Tr. 108.) The case is that of *Strickland Transportation, Inc.—Extension—Dangerous Explosives,* 49 M. C. C. 595 (Aug. 1949). It will first be noted that this decision is by a Division of the Commission and not one of the entire Commission. In that case Division 5 of the Interstate Commerce Commission stated that "a carrier authorized to transport general commodities except 'dangerous explosives' lawfully can transport those explosives which the Commission has classified 'relatively safe' but not those which it has classified as 'dangerous' whether more dangerous or less dangerous." (601.)[3]

We are concerned here with the applicability of the "primary jurisdiction" doctrine. The United States Supreme Court has held in a number of cases that determinations in decisions of the Interstate Commerce Commission and other administrative agencies dealing generally with the subject under consideration in the particular case do not preclude the necessity for the

[3]For full statement of the pertinent portion of the opinion see Appendix I, Item No. 2.

application of the doctrine where it is otherwise called for.

Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 928, 57 L. Ed. 1494 (1913);

Midland Valley R. Co. v. Barkeley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664 (1927);

U. S. Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932);

St. Louis B & M R. Co. v. Brownsville Nav. Dist., 304 U. S. 295, 58 S. Ct. 868, 82 L. Ed. 1357 (1937).

In determining the sufficiency of the *Strickland* case, *supra,* as a regulation of the Interstate Commerce Commission defining the scope of the appellant's certificate, consideration must be given to the fact that subsequent to the issuance of that decision changes were made by the Commission in the regulations to which the decision refers. (Ex. 23, Ex. 24, Tr. 90.) The *Strickland* case was decided in 1949. On May 3, 1950 the Interstate Commerce Commission amended the regulations, as has been noted, to delete from them the words "dangerous" and "less dangerous" (the words of reference used in the case). (Tr. 90, Ex. 23, §73.52.) Before it can be said that this case continues to be applicable to the factual situation herein presented, it is first necessary to make two assumptions: (a) that the words "dangerous" and "less dangerous" as used in the cited case were used by Division 5 as synonymous

with "Class A" and "Class B"; and, (b) that the rather extensive amendments to the particular portions of the regulations (including the deletion of the specific words used) had no significance so far as interpretation of certificates is concerned. It is impossible from any facts here presented to determine the accuracy of either of the assumptions. The cited decision, like the certificate and the regulations, falls short of being a clear administrative regulation.

2. Is "special familiarity with the complicated factual situations peculiar to the field" imposed?

The statute, by virtue of which the regulations governing the transportation of explosives are issued, expressly recognizes the complicated character of the problems presented. In addition to delegating to the Interstate Commerce Commission the task of formulating such regulations the Congress states in the statute that the Commission may call upon the Bureau of Explosives and other government agencies for assistance. (18 U.S.C.A. §835.) It is only necessary to compare Exhibits 23 and 24 to recognize that the properties which establish the relative transportation hazards of explosive articles are many and varied. Exhibit 23, §73.53 undertakes to define explosives of a particular class both in terms of the reaction to certain detailed tests and in terms of the adaptability of the product for an intended use. Certainly highly technical knowledge is required to know and understand what the properties of an article are which will cause it to be detonated by a No. 8 blasting cap or by a drop of less

than 4 inches in the Bureau of Explosives, Impact Apparatus. (Ex. 23, §73.53(a) to (h) inclusive.) Similarly, the distinction for purposes of definition between a "gun" and "small arms" calls for highly specialized knowledge. All of these factors enter into the determination as to what is meant by the term "dangerous explosives" as used in the certificate of appellant.

The technical problems presented are two-fold: (1) Which of the many explosives items listed in the extensive regulations fall within the category of "dangerous" as the term is used in the certificate? (2) What are the properties of a specific item transported to make it qualify as falling in a category generally designated as "dangerous"? Differences can and may well exist between the considerations relating to packaging and shipping which are the direct subject of the regulations and considerations relating to the authority as such to transport under the certificate. The regulations specifically indicate that all of the products designated in the several counts of the information are sufficiently safe for transportation to be "acceptable" for handling by motor carriers. (§77.801, Ex. 23.) The factors, if any, that may call for a different standard of measurement for determining the conditions under which a motor carrier should be denied the right to carry the goods despite these regulations (i.e., to have them "excepted" in a certificate) most certainly call for the expert judgment and special knowledge it is the function of the Interstate Commerce Commission to provide.

3. Is the situation one in which the problems raised "involve expert knowledge of multitudinous detail of intricate nature in a technical field"?

Applicant respectfully submits that what has been said above clearly demonstrates the highly technical nature of the inquiry involved in determining the meaning of the words "dangerous explosives". The Trial Court seemed to be of the opinion that all explosives are dangerous. (Tr. 110.) The attorney for the Interstate Commerce Commission who testified gave it as his opinion that the phrase in issue did not include "Class C" explosives. The regulations upon which the United States relies and the statute authorizing them speak of "explosives and *other* dangerous articles". (Emphasis added.) (Ex. 23, 18 U.S.C.A. §835.) The factors which produce the conclusion that Class C explosives are not "dangerous" within the meaning of that language as used in a certificate call for highly specialized knowledge and information.

Count 17 describes "rocket ammunition for cannon with explosive projectiles". In Exhibit 23 the regulations define rocket ammunition as ammunition designed to be fired from launches and other devices but not from cannon. No product exactly fitting the description used either in the Count of the information or in Exhibit 19 appears anywhere in the document. In what classification is this item then to be deemed to fall? Certainly the situation is one in which multitudinous detail in a technical field is involved.

4. Is the question one where the uniformity of interpretation of rules and consistency of interpretation are required?

No citation of authority should be required to support the proposition that it is imperative that all certificates containing the same language should be given the same interpretation. Confusion would most certainly result if the interpretation of the meaning of the words "except dangerous explosives" were left to the individual judgment of different courts and different juries. Appellant could well find itself in a position in which its certificate would mean different things depending upon the judicial district in which the operation was performed.

The situation here is to be distinguished from that in which the only problem presented is the application of a clear and certain rule. The distinction between interpretation and mere application is a basic test for application of the primary jurisdiction doctrine.

Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915);

Pennsylvania R. Co. v. Sonman Shaft Coal Co., 242 U. S. 120, 37 S. Ct. 46, 61 L. Ed. 188 (1916);

Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed 999 (1931);

Trans-Pacific Airlines, Ltd. v. Hawaiian Air Lines, Ltd., 174 Fed. (2d) 63 (C.C.A. 9th Cir. 1949);

Civil Aeronautics Board, et al. v. Modern Air Transport, Inc., 179 Fed. (2d) 622 (C. C. A. 9th Cir. 1949).

The case last cited presents a good example of the distinction which exists. There the sole question was the application of a set of rules specifically applying to the situation presented. No technical questions were involved. In the instant case, however, the meaning of the term involved is not clear. Examination of the regulations only adds to the questions and confusion. The meaning of the language used cannot be ascertained by mere reference to a dictionary or to the commonly understood usage of the words. Different judges upon the same record might, with good reasons, arrive at different results. If the certificate of appellant and all other certificates containing similar language are to be given the same meaning it is imperative that there be a clear and unequivocal determination of the meaning of the language by the Interstate Commerce Commission. It is respectfully urged that the case is a proper one for the application of the "primary jurisdiction doctrine".

The doctrine applies to criminal proceedings as well as in civil matters.

United States v. Pacific & Arctic R. & N. Co., 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742 (1913);

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827 (C. C. A. 6th 1946).

Since this is a criminal case the District Court should be directed to dismiss the action if the doctrine is found to be applicable.

Hancock Manufacturing Co., v. United States, 155 Fed. (2d) 827 (C.C.A. 6th 1946).[4]

B. The Argument Directed to the Question of the Certainty in Language in Defendant's Certificate to Give Notice to it of the Commodities Which Might and Might Not Be Transported Thereunder. (Specification of Error Number Two).

1. Summary of the Argument.

Federal Courts do not recognize the existence of a "constructive offense". The Interstate Commerce Act gives to the Interstate Commerce Commission a number of different remedies for correcting improper activities by a carrier allegedly violating its certificate. Appellant should not be criminally prosecuted and convicted for unlawful transportation of property unless it appears that at the time of such transportation the definition of the products excepted from the certificate had been clearly announced by he Commission. Such regulations as had been promulgated were not sufficiently definite and certain to place appellant on notice of the possible unlawful character of its conduct. Conviction of the defendant constitutes conviction by construction. Appellant has been "construed into jail".

[4]See Appendix I, Item No. 3, for quotation from the case cited. The factual situation is such that the case has particular pertinence.

2. Statement of the Argument.

Upon a determination that a question existed as to the propriety of the acts of the appellant several remedies were available to the Interstate Commerce Commission. The Commission had the power to institute investigation through its own procedures to determine whether or not a violation of the certificate existed.

49 U. S. C. A. §319;
49 U. S. C. A. §13(2).

Except for the applicability of the "primary jurisdiction" doctrine the remedy of injunction was also available.

49 U. S. C. A. §322(b).

This action is criminal in its nature. It was instituted without any prior admonition by the Commission to appellant that its activities were considered improper. (Tr. 79.)

The criminal character of the prosecution brings into the inquiry an element not present in the other possible forms of procedure. Before a person can be punished criminally it must plainly appear that he has violated the law or some rule or regulation lawfully binding upon him by force of law.

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827, (C. C. A. 6th, 1946);
See: *U. S. v. Pacific & Arctic Railway and Navigation Co.,* 228 U. S. 87, 33 S. Ct. 443, 57 L. Ed. 742 (1913).

The Court in the case first cited above stated the proposition as follows:

> "Moreover, in federal jurisprudence, there is no such thing as a constructive offense. We have repeatedly pointed out that a citizen cannot be construed into jail." *Hancock Mfg. Co. v. U. S., supra,* p. 832.

In the discussion of the argument relating to the "primary jurisdiction" doctrine appellant has pointed out a number of the many circumstances which demonstrate that the meaning of the words "dangerous explosives" as used in its certificate is far from clear and certain. It would serve no useful purpose to repeat the details of those examples here.

The question is not one of notice of the potentially dangerous properties of any given articles but whether the article, whatever its properties, properly fell within the meaning of the words used in the certificate. The record shows that when the problem was first presented the appellant was unable to determine the answer to the question for itself. (Tr. 188.) Appellant sought the advice of legal counsel on the subject. (Tr. 188.) It felt called upon to file an application, the fundamental purpose of which was a clarification of the very term which is here involved. (Ex. 2, Tr. 193.) Nowhere, in any effective regulations governing the transportation of explosives was there a definition of the term "dangerous explosives". (Ex. 23, §§73.51, 73.52, 73.53, 73.88, 73.100.) The Interstate Commerce Commission had recently amended its regulations by

deletion therefrom of the words "dangerous" and "less dangerous" as characterizations of the commodities in the sections of the regulations undertaking a definition. Only by assuming that these amendments had no substantive effect upon the definition of the term "dangerous explosives" as used in certificates could it be inferred that all items falling within explosives "Class A", "Class B", or "Class C" should be included in the prohibited class.

It is respectfully suggested that under all the circumstances and considering the confused state of the regulations, it may not be said that the existing regulations were clear and certain. Before finding appellant guilty the District Court was required to make a preliminary finding of fact that the words "dangerous explosives" included such items as hand grenades and rocket ammunition. Nowhere, in the effective regulations are these products so designated. Even assuming the propriety (in view of the primary jurisdiction doctrine) of the action of the Court in undertaking to define the language of the certificate the fact still remains that a definition by the Court was required before a conviction could result. The conviction depends upon the construction of the language of the certificate by the Court.

It is respectfully submitted that the regulations existing at the time this transportation was performed and the phraseology of the certificate were both sufficiently indefinite and uncertain that reasonable minds could differ as to the scope and meaning of the phrase

"except dangerous explosives". Under the circumstances there did not exist that plain and lawfully binding regulation which is a necessary requisite to a criminal liability.

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827, (C. C. A. 6th Cir. 1946).

C. Argument Related to the Admissibility of Exhibits Numbers 3-22 Inclusive and Upon the Ruling Denying the Motion to Strike Such Exhibits. (Specification of Error Number Three and Number Four).

1. Summary of the Argument.

The shipments here involved were sealed against examination by any person in the employ of the defendant. Exhibits 3-22 inclusive cannot, therefore, constitute an admission of the facts recited. The fact also affirmatively appears that the entrant of the information on the exhibits could not have known the truth of the facts recorded. The foundation required by statute was not laid because (a) no proof was offered to establish the identity of the entrant; (b) the United States presented no evidence to establish the source of the information to the entrant (whoever he may have been); (c) no proof was offered as to the identity or capacity of the original declarant; (d) no evidence was presented to establish that the original declarant (whoever he may have been, and by whom employed) prepared the information in the course of business of the business or agency by whom he may have been employed; (e) no evidence was presented

that the original information was transmitted to defendant for entry by defendant; (f) no evidence was presented to prove the original declarant made records, or, if so, that they were made at or about the time of the event. No explanation was given for the failure to produce such proof.

Since the defendant was prohibited by the sealed character of the equipment from examining the contents of the shipments the statements in the freight bills as to the contents are hearsay as to the defendant. Proof of the facts as to the contents and characteristics of the shipments may not be established by the invoices alone. Before the invoices become probative evidence of the facts as to the nature of the contents some independent proof to establish the guarantee of their accuracy as to the description of the contents is required. No such proof was here presented.

2. Statement of the Argument.

Specifications of Error Numbers Three and Four may be considered together since they are related to the same subject. The exhibits involved are Exhibits 3, 4, 5, 6, 11, 14, 15, 16, 17, 18, 19, 21 and 22 (herein referred to as Exhibits 3-22 inclusive). Each exhibit relates to a different count in the information. Except for Exhibit 4 all exhibits consist of a copy of a freight bill produced from the records of the appellant.

Counsel for the appellant believes it to be a correct statement that the case of the United States rests en-

tirely upon these documents as proof of the acts and occurrences necessary to establish criminal liability. The sole witness appearing for the United States had no independent knowledge of the facts beyond those reflected in the records or statements related to him by an employee of the appellant who in turn secured all information which he undertook to give from the face of the document itself. (Tr. 50-51, 71.) No evidence was tendered by the United States to prove that the documents were the only available source of information. No evidence was introduced to explain the failure to produce direct testimony. It is necessary, therefore, to support the conviction of the defendant that these documents were properly before the Court and that they constitute sufficient proof of the transaction which is the basis of the several counts of the information.

Since it affirmatively appears from the evidence that the employee of the appellant making the entry could not have seen the product described in the freight bills and there is no proof that such person ever saw or had access to any means of acquiring actual knowledge of the facts purportedly recorded, the documents may not be considered as an admission. Counsel does not understand that the United States so contends. Rather, the documents are offered as records made in the regular course of business of the appellant and claimed to be admissible as such despite the hearsay character of the information.

Title 28, §1732 sets forth the terms and conditions under which business documents will be received and the effect to be given to such documents.[5]

The first objection urged to the documents is the insufficiency of the foundation to justify their introduction and retention in evidence. Reduced to its essentials this foundation consists of a statement of an attorney for the Interstate Commerce Commission that the documents were secured from the files of the appellant; that the documents are freight bills; that the appellant is required to make freight bills of shipments which it handles. From other evidence subsequently presented, it appears affirmatively that the entrant (an unknown person, presumed to be an employee of appellant) could not have had personal knowledge of the facts recorded because the shipments were physically sealed in the vehicle in which they moved and could not be examined. (Tr. 156-158.) We know in addition only that it was the practice of the employees of the appellant to make such documents from shipping documents prepared by others, i.e., the originating carrier or the United States, and that it was not infrequent that the original shipping documents of the government were unavailable. (Tr. 198.)

The mere fact that the paper offered is taken from a business file does not *ipso facto* make it admissible.

> *Schmeller v. United States,* 143 Fed. (2d) 544 (C. C. A. 6th Cir. 1944).

[5]The text of the section is set forth in Appendix I, Item No. 4.

The act, transaction, occurrence or event which the entrant records must be one of which either he has actual knowledge or which he learns from a declarant who shall in the course of the business transmit the information for inclusion in the memorandum.

> *United States v. Grayson,* 166 Fed. (2d) 863, (C. C. A. 2nd Cir. 1948).

In the present case there is affirmative evidence that the entrant (i.e., appellant's employee) could not have had personal knowledge of the facts recorded. The shipment was sealed against examination. The first possible basis for assuming the accuracy of the statement as a business document, therefore, is absent.

The United States made no effort to establish from what source the information may have been obtained. The suggestion is made that it may have come from a government bill of lading. (Tr. 123.) These documents should have been available in government records. No evidence to explain their absence at the trial was shown. The witness offering the documents had not compared them with any other shipping records. (Tr. 77, 123.) Except for the statement of Mr. Shepherd, made after the documents had been received and the motion to strike denied, that the information might have come from any one of several different places, the record is entirely silent as to the possible sources of the information to the entrant. Exhibit A reflects that the shipping documents presented to appellant from different sources covering the same shipment may vary as to context.

To establish the foundation for the admissibility of the documents the burden was on the United States to prove the entries were a part of the business records and that they were made at or about the time of the events. Since the documents reflect at most simply the entries from other documents the burden was on the United States to prove the basic facts to establish as business records the documents from which the entries in appellant's records were allegedly made. This the United States did not do. It failed both to show the source of the entry in the appellant's records and the time of that entry. Even if it be assumed that the source was taken from some document coming from another, no showing is made as to what this document may have been or the circumstances surrounding its preparation.

Once the United States was compelled to concede, as was the case here, that the appellant had no access on the basis of personal knowledge to the facts as to the physical contents of the shipments described, the burden was on the United States to show the source of the information and facts to prove the probative value of such source. It was incumbent to establish, as a condition of the admissibility of the exhibits, that the person making the original documents in turn prepared them in the course of business in conformity with the requirements of Title 28, §1732 and that the information was transmitted for inclusion in the records of appellant. Such evidence is wholly absent from the record. Nor is its absence explained. It is respectfully submitted that under the particular fact circum-

stances here presented sufficient foundation was not laid to meet the requirements of §1732, Title 28 U. S. C. A.

To be admissible in evidence the documents must not only meet the requirements as to foundation but they must also meet the necessary standards of competency. The documents are relied upon to prove both the fact of transportation and the explosive character of the articles involved. These are both subjects which it would seem could be proved or substantiated by production of witnesses personally familiar with the facts. In this instance no such direct evidence was presented. No explanation for the lack of such evidence was given. Even though the entrant may not have personal knowledge the record must have some guarantee of accuracy as reflecting the probative fact. The probative fact must be reflected by the document.

The freight bill, in effect, is an invoice. In *United States v. Garvey,* 150 Fed. (2d) 767 (C. C. A. First (1945)), much the same situation as is presented here was before the Court. The defendant was charged with the theft of clothing in interstate commerce. By independent evidence defendant had been proved to have taken certain cartons. To prove the value of the goods and the contents of the cartons the United States offered invoices, properly authenticated, of the two shippers. As to one of the shippers, evidence was also offered of the practice of comparing the goods with invoice as it was packaged. As to the other shipper no such information was furnished. With respect to the sufficiency of these invoices the Court stated:

> "That was obviously good evidence as far as it went, but it did not prove that the cartons in fact contained the clothing described in the invoices." (767.)

The Court then held that the invoices of the one shipper when supplemented by direct proof as to the practice of checking against the contents were admissible to prove the facts reflected, but that the invoices of the other shipper with respect to which such supplementary evidence was not given could not be accepted as proof of the fact of the contents of the cartons.

The facts here against the competency of the evidence presents a stronger case than do those in the case cited. There the person who made the record was present and presumably the facts could have been known to the entrant. Here the evidence affirmatively shows the employees of appellant could not have known the facts from direct knowledge. There is a complete failure of evidence as to the manner in which the record was prepared and as to the reliability of the sources of the information.

In *Schmeller v. United States,* 143 Fed. (2d) 544 (C. C. A. 6th Cir. 1944), the trial court admitted into evidence as a group a series of documents established to have come from the files of the defendant kept in the regular course of business. They were offered to prove the manufacture of defective war materials. Some of the documents contained statements which constituted hearsay as to the defendant. The Court in the cited case held the introduction of these documents

as a group and without establishing the authenticity as to the sources of each was error.

In the instant case the statements on the shipping documents of the appellant are clearly hearsay since it was prevented by the manner in which the goods was shipped under seal from a personal verification of the truth. As noted in the case last cited, §1732, Title 28 U. S. C. A. does not abrogate ordinary requirements of relevancy and competency.

In *John Irving Shoe Co. v. Dugan,* 93 Fed. (2d) 711 (C. C. A. First, 1937), plaintiff sued to recover for work done in a construction project for defendant. To prove its claim the plaintiff offered an itemized statement showing the entry of some 400 different items of goods and materials furnished. The trial court ruled that this invoice did not prove the fact that labor or material was furnished as itemized therein. This ruling was affirmed by the Circuit Court on appeal.

A case presenting many elements similar to those which are here involved was presented to this Court in *Lomax Transportation Co. v. United States,* 183 Fed. (2d) 331 (C. C. A. 9th Cir. 1950). In the cited case the United States brought action for damages for destruction of naval stores in a warehouse of the defendant. Evidence as to what the goods were, their value and the amount of damage done to them was contained in a certificate of settlement prepared apparently by the office of Comptroller of the United States and issued under his name by some person presumably in his department. This court in the cited case held the docu-

ment inadmissible to establish the probative facts involved. As a part of its opinion this Court stated:

> "No witness who had knowledge of the goods, of the value or of the amount of damage done to them was produced. It is inconceivable that the provisions of Sections 1732 and 1733, Title 28 United States Code Annotated, although they do, of course, render admissible, when duly authenticated, the records and claims, or transcripts thereof, of which a certificate is the culmination could have the effect of converting the mere *ex parte* statement of the claim itself into evidence of the extent to which the naval supplies stored in appellant's warehouse had been damaged by fire." (334.)

Although the specific facts are different the parallel of the factual situations is rather close. The specific document tendered in evidence here is nothing more than a transcription of words from an unknown source by a person who had no knowledge of the facts. Who may have actually prepared the document is not known. Presumably it was an employee of appellant. The person who presented the record simply took it from the company files. What actually was the source of the information contained in the record was not shown. Even on its face the document does not undertake to describe a particular article. Rather it describes a class of articles. No witness who had knowledge of the goods was presented. No witness who had knowledge of the facts of classification was presented. The

record is even devoid of testimony as to how, or by whom, the classification may initially have been made.

The whole case of the United States hinges upon the fact that the investigator for the Interstate Commerce Commission found among the freight bills of the appellant certain documents using certain words to describe certain classes of items described in Exhibit 23 as having explosive characteristics. No positive evidence is presented as to the identity of the entrant, the time or circumstances when the entry was made, the source of the information, the validity of the source or the accuracy of the judgment of the person who may originally have selected as descriptive of the products the words which ultimately found their way into the documents in question. All that is actually known for certain is that no person in the employ of the appellant had an opportunity to see or examine the goods at any time.

The freight bill alone, considering the known circumstances, and the many unknown factors, cannot be accepted as competent proof of the fact as to the character of the goods or as to their explosive characteristics.

See:

Reineke v. United States, 278 Fed. 724 (C.C.A. 6, 1922);

Ellis v. United States, 57 Fed. (2d) 502 Cer. Den. 287 U. S. 635, 53 S. Ct. 85, 77 L. Ed. 550 (1932).

Appellant respectfully submits that the admission into evidence of Exhibits 3-22 inclusive was error and that the denial of the motion to strike upon completion of the evidence of the United States was likewise error.

D. The Argument Directed to the Sufficiency of the Evidence to Establish the Fact of Transportation and the Explosive Character of the Commodities Shipped. (Specification of Error Number Five.)

1. Summary of the Argument.

Essential elements of the offense charged are the exact nature of the goods transported and that the explosive characteristics thereof are such that they qualify as "dangerous." The sole evidence to prove both of these fact elements is contained in Exhibits 3-22 inclusive and Exhibits 23 and 24. All of the exhibits describe a class of commodities and not particular products. Description by general classification in shipping documents is insufficient to prove the contents of the several trucks and their particular explosive characteristics.

2. Statement of the Argument.

Examination of Exhibit 23, Sections 73.53 and 73.88 reveals at once that each and every one of the so-called commodity descriptions appearing in Exhibits 3-22 inclusive is in fact description of goods by a general class and not by a particular product. "Ammunition for cannon, with explosive projectile," for example, is defined in such general terms that it includes many dif-

ferent kinds and sizes of shells. It is obvious from Exhibit 23 that the classification into which a particular item of ammunition falls depends upon the intended use and the detonating characteristics of the particular explosive ingredients used. The record is devoid of any evidence to prove that the particular goods in any of the appellant's trucks had the explosive properties or the intended use necessary to bring it within the classification described. To conclude that the particular ammunition was in fact "ammunition for cannon" it must be presumed that some entirely unknown person had the necessary technical qualifications to evaluate properly the explosive characteristics of the goods and that he did in fact correctly classify it.

The problem is an important one. A particular shell does not become "ammunition for cannon" simply because someone says it is such. It is ammunition for cannon only if it has certain properties. Without some knowledge of the contents and properties of the particular type of ammunition appellant was powerless to challenge the correctness of the classification by expert testimony or otherwise.

The proper classification of a particular item of property under the several classifications in a tariff or regulation is a highly technical process calling for considerable expert judgment.

See:

Texas & P. R. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 S. Ct. 885, 58 L. Ed. 1255 (1921);

Standard Oil Co. v. United States, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999 (1931);
Armour and Co. v. Alton R. Co., 312 U. S. 195, 61 S. Ct. 408, 85 L. Ed. 771 (1941);
Hancock Mfg. Co. v. United States, 155 Fed. (2d) 827 (C.A.A. 6th Cir. 1946).

The nature of the particular products and their explosive characteristics are the gravamen of the offense. Appellant respectfully submits that criminal liability should not depend entirely upon the mere presumption that some unknown person properly analyzed the explosive properties of a given product and correctly described it under a regulatory classification. The judgment is unsupported by the evidence because there is no proof that the goods shipped were actually such that they would be described properly under the classification chosen and no proof of their explosive characteristics.

The entire case of the United States depends upon the sufficiency of the entries in appellant's freight bills to prove the fact as to what was in the trucks that moved and that the goods, whatever they might have been, had certain explosive characteristics. As has been noted in a previous connection, direct evidence is required to prove the nature of a commodity, even though it may be described in a business document.

United States v. Garvey, 150 Fed. (2d) 767, (C. C. A. First, 1945);
John Irving Shoe Co. v. Dugan, 93 Fed. (2d) 711 (C.C.A. First, 1937);

See: *Lomax Transportation Co. v. United States,* 183 Fed. (2d) 331 (C.C.A. 9th Cir. 1950).

No explanation is given by the United States for its failure to produce the direct evidence of the facts which must certainly have been available. The descriptions in the several exhibits are descriptions by class only. The appellant should not be criminally convicted upon the assumption, without any supporting evidence, that some unknown person exercised correct judgment in classifying a number of different specific products within the classifications used.

E. The Argument Directed to the Question of the Sufficiency of the Evidence to Prove That the Transportation was Knowingly and Willfully Performed. (Specification of Error Number Six).

1. Summary of the Argument.

The words "knowingly and willfully" contemplate the performance of the act with a bad intent. Appellant, as a common carrier, had a legal obligation to transport all goods tendered within the scope of its certificate. The United States as the shipper was in possession of a copy of the certificate. The meaning of the language in appellant's certificate was not clear. Appellant took prompt steps in an effort to ascertain and clarify the meaning of the language. It had no intimation from any representative of the Commission that its conduct was considered improper until the transportation was virtually concluded. The evidence

fails to establish the bad intent which the statute requires as an element of criminal liability.

2. Statement of the Argument.

Prior to the time that any of the questioned traffic moved, appellant submitted to the appropriate military authorities a copy of its certificate. (Tr. 183.) Shipments subsequently tendered by the United States included explosive items. (Tr. 104.) Many of these explosive items were products which the Interstate Commerce Commission now concedes were proper for transportation (Tr. 104-105). Frequently explosive items of different classifications were intermingled as a part of the same shipment. (Ex. 3, 5, 16, 17, 18, 22.) The contents of all shipments were sealed by the government against inspection. (Tr. 156-159.) Appellant at the time was handling in total some 40,000 to 60,000 shipments per month. (Tr. 182.) The traffic was tendered for shipment by the United States military authorities who held a copy of the certificate. (Tr. 183.) Appellant, as a common carrier, had a duty to accept the goods for transportation if it could do so under its certificate.

> *Wabash R. Co. v. Pearce,* 192 U. S. 179, 48 L. Ed. 397, 24 S. Ct. 231;
> *The Atchison, Topeka & Santa Fe Ry. Co. v. Denver & New Orleans Ry. Co.,* 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

The general traffic manager for appellant was unable to determine what commodities were to be consid-

ered as "dangerous explosives" by reference to then effective regulations. (Tr. 188.) Legal counsel was unable to answer the question. (Tr. 189.) An application was filed with the Interstate Commerce Commission in October, 1950 the purpose of which was to clarify the meaning of the language in question. (Ex. 2, Tr. 20-24, 193.) The investigation resulting in the information was not made until approximately the date of the last questioned shipment. (Tr. 50, Ex. 19.) During the investigation appellant made no effort to conceal its activities. (Tr. 78.) As more fully noted in the previous discussion of the argument relating to the "primary jurisdiction" doctrine the regulations of the Commission on the subject are not clear and certain.

The words "knowingly and willfully" are contained in the statute under which appellant has been convicted. 49 U. S. C. A. § 322.

The words mentioned imply not only a knowledge of the thing, but a determination that the act was done with a bad intent to do it. The word "willfully" means not merely voluntarily but with a bad purpose.

> *Luther M. Felton v. United States,* 96 U. S. 699, 24 L. Ed. 875 (1877);
> *Screws v. United States,* 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945).

It is respectfully submitted that in view of all of the circumstances surrounding the tender of the goods; in view of the confused character of the regulations;

because of the lack of a clear definition of the language of the certificate; and because of the prompt action which the appellant took to clarify the question long before any investigation was undertaken, it may not be said either that appellant had the knowledge that the shipments it transported were sufficiently "dangerous" to meet the requirements of the criminal statute, or that its transporaion was willful within the meaning of the Act in question.

F. Conclusion.

Appellant respectfully urges that the facts demonstrate here a case in which the "primary jurisdiction" doctrine is applicable and that the judgment should be reversed with directions to the District Court to dismiss the information. It is further submitted that apart from this issue the introduction and retention in evidence of Exhibits 3-22 inclusive constitute prejudicial error. Even conceding the correctness of the admissibility of these documents the evidence fails to establish the facts necessary to prove the existence of the offenses charged beyond a reasonable doubt. It is respectfully submitted that on each of the grounds urged herein a reversal of the judgment is required.

Respectfully submitted,

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Appendix

APPENDIX I

Item No. 1

a. Exhibit 23, Section 77.801, p. 120, provides as follows:

> §77.801. Scope of regulations in Parts 71-78. (a) Explosives and other dangerous articles, except such as may not be accepted and transported under Parts 71-78, may be accepted and transported by common and contract carriers by motor vehicle engaged in interstate or foreign commerce, provided they are in proper condition for transportation and are certified as being in compliance with Parts 71-78, and provided the method of manufacture, packing, and storage, so far as they affect safety in transportation, are open to inspection by a duly authorized representative of the initial carrier or of the Bureau of Explosives. Shipments that do not comply with Parts 71-78 must not be accepted for transportation or transported."

b. Exhibit 23, Section 77.822, p. 122, provides as follows:

> "§77.822. Acceptable articles. (a) Any motor carrier may accept for transportation or transport any acceptable explosive or other dangerous articles listed in the Commodity List, §72.5: *Provided, however,* That no provision of this section shall be so construed as to permit the acceptance or transportation of liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol din-

itrate, other than as defined in §73.53 (e), by any common carrier.

"(b) Liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol dinitrate. Liquid nitroglycerin, desensitized liquid nitroglycerin or diethylene glycol dinitrate, other than as defined in §73.53 (e)(may be transported only by motor carriers other than common carriers in containers complying with specification MC200 (§78.315). No form of trailer may be attached." (122-123.)

Item No. 2

Strickland Transportation Co., Inc., Extension—Dangerous Explosives, 49 M. C.C. 595 (1949). At pages 600 and 601, Division 5, two Commissioners participating, stated:

"One other matter is deserving of special comment and that is the identity of the commodities comprehended by the term 'dangerous explosives'. Notwithstanding that such term is frequently used in describing a class of commodities specifically granted or excepted from general-commodity authorizations, we have not heretofore specifically declared the commodities included in that term. This does not mean, however, that we have left the term undefined or that it is indefinite. In the Commission's Regulations Governing the Transportation of Explosives and Other Dangerous Articles by Rail Freight, Express, and Baggage Services, and by Motor Vehicle (Highway) and Water, the various different explosives are classified as 'Dangerous,' 'Less Dangerous,' and 'Relatively

Safe.' With this formal declaration of the commodities deemed, from a transportation standpoint, to be dangerous to a greater or lesser degree as contrasted with those which are deemed to be relatively safe, the proper construction of the term 'dangerous explosives' as used in operating authorities of carriers is clear. A carrier authorized to transport general commodities except 'dangerous explosives' lawfully can transport those explosives which the Commission has classified 'relatively safe' but *not* those which it has classified as 'dangerous' whether more dangerous or less dangerous. Conversely, a carrier authorized to transport 'dangerous explosives' may transport only those commodities classified as 'dangerous' and 'less dangerous' in the above-mentioned regulations of the Commission."

Item No. 3

Hancock Manufacturing Co. v. United States, 155 Fed. (2d) 827 (C. C. A. 6th 1946).

In the case cited, defendant was charged with unlawfully soliciting and receiving a concession from a motor carrier. The factual situation presented was whether or not the articles shipped were "stampings" within the meaning of the term in the carrier's tariff. In holding the "primary jurisdiction doctrine" applied and that the evidence was insufficient to support the conviction, the Court stated in part as follows:

"The court of course concluded that Hancock was guilty beyond a reasonable doubt, otherwise

there could have been no judgment. To support the verdict, the evidence must show beyond a reasonable doubt that appellant shipped automobile body parts as stampings and paid the lower rate carried by 'stampings'. This involves the critical question, whether the articles shipped constituted stampings. The court must have concluded that they did and must have drawn this inference from the testimony of the Government's witnesses. In our view another judge or other judges upon the same record might with reason have believed appellant's witnesses and have arrived at a contrary result and thus we would have the anomaly of convictions or acquittals upon the same record, the result depending upon the particular judge's viewpoint as to what constitutes stampings. Further, another or other sets of witnesses testifying upon the same subject in other cases might with reason and intelligence entertain varying opinions on the subject.

"The difficulty here is that it is manifest from the evidence that the word 'stampings' is indefinite and uncertain in its meaning and 'fixes no immutable standard' which a court must recognize as a matter of law. . . ."

"The court obviously could not be assisted by reference to a dictionary, or to popular usage or understanding, for the meaning of the term. The tariff was not clear whether an otherwise plain stamping ceased to be a stamping, because it had small parts welded to it for strength. . . ."

"Further, in our view the word 'stampings' used in the tariffs did not even present a question

of fact of the kind usually left with a jury. In reality it presented a question of fact the determination of which in a civil case has been adjudged to lie with a body of experts. In *Great Northern R. Co. v. Merchants Elevator Co.,* 259 U. S. 285, 42 S. Ct. 447, 66 L. Ed. 943, the Supreme Court rejected the contention that courts without jurisdiction in cases involving a disputed question of construction of the interstate tariff, stating the familiar rule that the construction to be 'given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in question.' But, quoting further:

" 'When the words of a written instrument are used in their ordinary meaning, their construction presents solely a question of law. But words are used sometimes in a peculiar meaning. . . .'

" It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether the words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the question in the *American Tie and Timber* case, *supra*. . . . The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. . . . This question was obviously not one of construction. . . . *The only real* question in the case was one of *fact*. . . .' As that question, unlike one of construction, could not be settled ultimately by this court, preliminary resort to the Commission was necessary to insure uniformity. . . .

"Upon evidence here, we are no more able correctly to construe or interpret the term 'stampings' than was the Supreme Court to settle by construction a freight tariff in the *Great Northern* case. Moreover, in federal jurisprudence, there is no such thing as a constructive offense. We have repeatedly pointed out that a citizen cannot be construed into jail. . . ." (830, 831, 832.)

Item No. 4

Title 28 U. S. C. A. §1732 provides as follows:

"§1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by an Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, tranaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in exstence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. As amended Aug. 28, 1951, c. 351, §§1, 3, 65 Stat. 206."

No. 13,403

United States Court of Appeals

For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., (a corporation),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 13,403

United States Court of Appeals
For the Ninth Circuit

West Coast Fast Freight, Inc., (a corporation),	*Appellant,*
vs.	
United States of America,	*Appellee.*

BRIEF FOR APPELLEE.

I.

PRELIMINARY STATEMENT.

Appellant herein was found guilty on thirteen counts charging it with knowingly and wilfully engaging in interstate commerce on a public highway as a common carrier by motor vehicle and as such carrier transporting shipments of dangerous explosives without there being in force with respect to appellant a certificate of public conveyance and necessity issued by the Interstate Commerce Commission authorizing such operations.

II.

JURISDICTION.

The offense is one against the United States under the provisions of the Interstate Commerce Act, Part II (49 U.S.C. 306(a)) and (49 U.S.C. 322).[1] Jurisdiction of the District Court is invoked by virtue of Title 18 U.S.C. 3231. Jurisdiction of the Court of Appeals arises by virtue of the provisions of Title 28 U.S.C. 1291.

III.

STATUTES AND REGULATIONS INVOLVED.

See Appendix, *infra.*

IV.

STATEMENT OF THE CASE.

Under the authority vested in it by the Interstate Commerce Act, Part II, the Interstate Commerce Commission issued to the appellant, West Coast Fast Freight, Inc., a certificate of public convenience and necessity authorizing it to operate in interstate commerce as a common carrier. Insofar as it is pertinent to this proceeding, this certificate authorized the appellant to transport in interstate and foreign commerce "general commodities, except dangerous explosives". Beginning on or about September 9, 1950, and continuing to about May 15, 1951, appellant en-

[1]See Appendix—Items 1 and 2 for text of these sections.

gaged in and did transport certain commodities, including the dangerous explosives herein concerned, from Oakland, California, to destinations in the States of Oregon and Washington.

Each of the said shipments of dangerous explosives originated at the Military Ammunition Installation at Herlong, California. They were loaded on trailers by military personnel under military authority and the trailers were thereupon sealed. Transportation was commenced by Wells Cargo, a certificated carrier which had authority to transport dangerous explosives between Herlong and the San Francisco Bay area. The contents of the trailers and the shipments therein were identified by Government bills of lading and the Wells Cargo freight bills. Wells Cargo made the haul from Herlong to Oakland, at which point the trailers containing the shipments were delivered to appellant. Each of the trailers containing the shipments herein concerned at all times remained sealed. The description of the contents as contained in the Wells Cargo freight bills and the Government bills of lading was accepted by appellant without challenge. Upon acceptance of the shipments appellant made and issued its freight bills (Exs. 3-22) wherein it charged itself with the transportation of the shipments therein described. The thirteen shipments upon which appellant was convicted were identified on appellant's freight bills (Exh. 3-22) as (1) detonating fuses, Count One; (2) explosive projectiles for cannon (Count Two); (3) rocket ammunition with empty projectiles (Counts Three and Seventeen); (4) am-

munition for cannon with explosive projectiles (Counts Two, Four, Twelve, Thirteen, Fourteen, Fifteen, Sixteen and Nineteen); (5) hand grenades (Count Nine); (6) black powder (Count Twenty). Appellants then transported said shipments to ultimate points of destination in Oregon and Washington.

V.

QUESTION PRESENTED.

Is the evidence in this case sufficient to sustain the conviction of the appellant for knowingly and wilfully engaging in interstate commerce on a public highway as a common carrier in violation of the terms of its certificate of public convenience and necessity?

VI.

SUMMARY OF ARGUMENT.

A. The finding of guilt by the District Court is correct and is sustained by competent evidence of record.

1. The extent of appellant's authority, as contained in its certificates, is stated in the form and in the language which are common in Commission practice.

2. The meaning of the term *dangerous explosives* has been determined by the Commission by its regulations, as well as by its independent decisions.

3. The shipping documents made and issued by the appellant were admissible and competent to prove the fact of transportation.

4. The evidence is sufficient to sustain the conviction of appellant for knowingly and wilfully engaging in interstate commerce on a public highway without a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such operation.

B. The remaining arguments advanced by appellant are subordinate and are not material to the issue.

1. Transportation for the United States Government, such as under consideration, is within the sole jurisdiction of the Interstate Commerce Commission.

2. The "primary jurisdiction" doctrine is inapplicable.

VII.

ARGUMENT.

A. THE FINDING OF GUILT BY THE DISTRICT COURT IS CORRECT AND IS SUSTAINED BY THE EVIDENCE OF RECORD.

1. The extent of appellant's authority, as contained in its certificate, is stated in the form and language common to Commission practice.

Although appellant has not directly raised the point, it has implied throughout the trial that the terminology of the certificate "commodities generally,

except dangerous explosives," is an innovation and is fraught with questionable meaning. This is not true. In *Coastal Tank Lines, Inc., et al. v. Charlton Bros. Transportation Company, Inc.,* 48 M.C.C. 289 (299) (1948) the Commission said "The term general commodities has been considered by the Commission to include all commodities other than those expressly excepted". In *Strickland Transportation Co. Inc., Extension—Dangerous Explosives,* 49 M.C.C. 595 (1949), the Commission in considering a similar verbatim exception (dangerous explosives) said that the "term is frequently used in describing a class of commodities specifically granted or excepted from the general commodity authorizations * * *"

Since the enactment of the Motor Carrier Act[2] in 1935, the Commission has issued hundreds of certificates containing the express prohibition, viz.: *except dangerous explosives,* in general commodity authority certificates.

Adams Transfer & Storage Company Application, 31 M.C.C. 231 (1941);

J. L. Barker Application, 41 M.C.C. 310 (1942);

Ernest E. Moore Application, 43 M.C.C. 91 (1944);

Lee Speirs Application, 47 M.C.C. 499 (1947);

Denver-Chicago Trucking Co.,—Extension, 53 M.C.C. 389 (1951);

Broadway Express, Inc.,—Extension, 54 M.C.C. 167 (1952).

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[2]The title Motor Carrier Act was changed to Interstate Commerce Act, Part II, by the Transportation Act of 1940.

2. The meaning of the term dangerous explosives has been determined by the Commission's regulations as well as by its independent decisions.

These regulations have been established in accordance with the authority contained in Title 18 U.S.C. 835, originally enacted into law March 4, 1909 (35 Stat. 1134). Such *authority* is also contained in Section 204, Part II of the Interstate Commerce Act (49 U.S.C. 304). On August 16, 1940 (No. 3666) Regulations for Transportation of Explosives and Other Dangerous Articles by Land and Water in Rail Freight, Express, and Baggage Services, *and by Motor Vehicle* (Highway) and Water, became effective. The purpose of these regulations was to minimize the dangers to life and property incident to the transportation of explosives and other dangerous articles.

See:

Hughes Transportation, Inc.,—Extension, 46 M.C.C. 603(608).

These regulations are published in the Code of Federal Regulations (49 C.F.R. 71-78) and have the force of law. *Houff Transfer Inc. v. United States, et al.,* 105 Fed. Supp. 847.

Part 72 of said regulations contains the classification list of all explosives (and other dangerous articles). Explosives, therein, are classified as Class A, Class B and Class C. (Ex. 23 and 24.)

The explosives transported by appellant and which form the basis for the thirteen counts of the information upon which the appellant was convicted are, accordingly, classified (Tr. 145) as:

Detonating fuses	Class A
Explosive projectile for cannon	Class A
Ammunition for cannon with explosive projectiles	Class A
Hand grenades	Class A
Black powder	Class A
Rocket ammunition with empty projectiles	Class B

Since the promulgation of the regulations, with particular reference to motor carriers, the Commission has held that Class A and Class B explosives are "dangerous explosives".

Motor Carrier Safety Regulations (Ex Parte No. MC-13) Explosives, etc., 27 M.C.C. 63 (83) (1940);

Novick,—Extension of Operations—Explosives, 37 M.C.C. 696 (1942);

Buckingham Transportation Co.—Extension,—Explosives, 46 M.C.C. 1098 (1946);

Strickland Transportation Co. Inc.—Extension,—Dangerous Explosives, 49 M.C.C. 595 (1949);

M. I. O'Boyle and Sons, Inc., et al. v. Houff Transfer, Inc., 52 M.C.C. 307 (1950);

Consolidated Freightways, Inc.,—Extension—Explosives (1951), Docket No. M.C. 42487, Sub. No. 229. 8 Federal Carrier Cases 32,305 (Dec. 11, 1951).

From the *Consolidated Freightways, Inc.,* the following is quoted:

> "In our regulations governing the transportation of explosives and other dangerous articles, explosives are classed as dangerous, less dangerous, and relatively safe. A carrier authorized to transport general commodities except 'dangerous explosives' lawfully may transport those explosives which we have classified as 'relatively safe' but *not* those which we have classified as 'dangerous' whether more or less dangerous. Conversely, a carrier authorized to transport 'dangerous explosives' may transport only those commodities classified as 'dangerous' and 'less dangerous' in the above-mentioned regulations. See *Strickland Transportation Co., Inc., Ext.,—Dangerous Explosives,* 49 M.C.C. 595, 600. It is apparent from the record that applicant is cognizant of the Commission's classification of the various kinds of explosives and dangerous articles, and that the authority it is here seeking is to transport explosives of all types."

Appellant has laid considerable emphasis on what is called the "primary jurisdiction" doctrine. Consideration will be given to this subject later. However, one matter in connection with the argument is appropriate at this time.

Appellant points out (Tr. 85-110, inc.) that between the effective date of Tariff No. 6 (Ex. 24) and the effective date of Tariff No. 7 (Ex. 23) and on May 3, 1950, by supplement to Tariff No. 6, the phraseology used by the Commission to describe Class A-B-C explosives, respectively (Part 73.52) was changed. The argument is made that the new phraseology alters

the Commission's approach to the regulation of explosives, and in particular to the term "dangerous explosives".

As a result of continuing experiments in the field of explosives an article which is classified at one time as Class B may later be reclassified as Class C, or vice versa. However, regardless of the numerous descriptive revisions and commodity reclassifications resulting from progressive scientific research, at no time has the *classification* of the explosive articles herein concerned ever been changed. They were at the time of the violations here alleged and now are classified as Class A or Class B.

Exhibits 23 and 24 are re-publications of the Commission's explosive regulations independently compiled in the form as presented for the convenience of the motor carrier industry (as far as pertinent here). Appellant is named as a participating carrier[3] in each publication. These re-publications are referred to as *tariffs*. Because of the scientific and technical nature of the subject-matter requiring continuous exploration in the explosive field, the Commission maintains an open investigation docket resulting in frequent modifications and amendments to the regulations. These changes are reflected in the tariffs by supplements thereto. After so many supplements have been added and, mainly for the purpose of conveni-

[3]Generally speaking, a participating carrier in an explosive tariff is one authorized to transport explosives. Appellant is authorized to transport commodities, generally, *including* dangerous explosives over other segments of its routes not here involved.

ence, the tariff is re-issued in one volume which includes all supplements. The *changes* involve deletions, additions, alterations, re-classifications, re-descriptions, or instructions for handling—all required because of results of constant research in the scientific field.

In the *Strickland* case, supra, the Commission said:

> "One other matter is deserving of special comment and that is the identity of the commodities comprehended by the term 'dangerous explosives'. Notwithstanding that such term is frequently used in describing a class of commodities specifically granted or excepted from general commodity authorization, we have not heretofore specifically declared the commodities included in that term. *This does not mean, however, that we have left the term undefined or that it is indefinite.* In the Commission's regulations governing the transportation of explosives and other dangerous articles by rail freight, express and baggage service and by motor vehicle (highway) and water the various different explosives are classified as 'dangerous explosives', 'less dangerous', and 'relatively safe'. With this formal declaration of the commodities deemed, from a transportation standpoint, to be dangerous to a greater or lesser degree as contrasted with those which are deemed to be relatively safe, the proper construction of the term "dangerous explosives" as used in operating authorities of carriers is clear. A carrier authorized to transport general commodities, except dangerous explosives, lawfully can transport those explosives which the Commission has classified 'relatively safe', but not those which it has classi-

fied as 'dangerous' whether more dangerous or less dangerous." (Italics supplied.)

The language of the *Strickland* case was followed in *Consolidated Freightways, Inc.,—Extension,* supra (1951).

Furthermore, in Section 77.823 of the Code of Federal Regulations,[4] the Commission has prescribed that vehicles transporting explosives Class A and Class B must be placarded. Appellant admits that the subject vehicles carried the proper placards (Tr. 173). In Section 197.1 Code of Federal Regulations,[5] with respect to driving rules, the Commission has ordered: "* * * Nor shall any driver leave unattended any motor vehicle loaded with *dangerous or less dangerous* explosives * * *" (Italics supplied.) The foregoing two regulations since the original promulgation thereof have not been altered, changed or amended in any manner.

Appellant contends that since the Commission has amended its definition of explosives (49 C.F.R. 73.52), "that at least beginning in the year 1951, they (the Commission) desisted from their practice of describing in certificates, as an exception or otherwise, *dangerous explosives,* as defined in their regulations". (Tr. 99.) This is not a fact. No change has been made in the terminology of such certificates—it remains the same.

W. O. Harrington—Purchase, 57 M.C.C. 303 (Jan. 1951);

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[4]See Appendix—Item 3 for full text of Regulation.
[5]See Appendix—Item 4 for full text of Regulation.

Denver-Chicago Trucking Co.—Extension, 53 M.C.C. 389 (Oct. 11, 1951);
Broadway Express, Inc.—Extension, 54 M.C.C. 167 (April 1952);
Southern Pacific Co.—Control, 58 M.C.C. 341 (April 1952).

It is indisputable that since 1940 the Commission has declared itself with respect to the determination of the meaning of the term *dangerous explosives.* It has without equivocation declared that explosive commodities having Class A or Class B characteristics are dangerous explosives.

3. The freight bills made and issued by the appellant were admissible and competent to prove the fact of transportation.

The principal evidence in support of the charges against appellant consisted of appellant's own freight bills containing thereon specific terms describing the commodity transported. (Exs. 3-22) (Tr. 159). The regulations required the appellant to prepare freight bills.[6] The articles transported were explosives and within the provisions of the Commission's regulations governing the preparation of shipping documents for the transportation of explosives. (49 C.F.R. 77.820.)[7] The said freight bills were prepared in accordance with the regulations in the regular course of business. 28 USCA 1732. See Appellant's Brief, Item 4, page 6, Appendix.

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[6]See Appendix—Item 5 for full text of Commission's general order of October 5, 1939.

[7]See Appendix—Item 6 for full text of Regulation.

Under the authority of Title 49 U.S.C. Sec. 320(d) the Commission has prescribed regulations for the preservation of records (49 C.F.R. 203, et seq.—Preservation of Records) and also has made it mandatory upon common carriers to keep and produce such records for inspection upon demand by the Commission's agents.[8]

The admissibility of the records, particularly freight bills of motor carriers under the jurisdiction of the Interstate Commerce Commission, has been definitely established.

United States v. Alabama Highway Express, Inc., 46 F.Supp. 450, affirmed 325 U.S. 837, 65 S.Ct. 1274 (1945);

Zimberg v. United States, 142 F.2d 132 (C.A. 1), cert. den. 323 U.S. 712;

United States v. Deardorff, 40 F. Supp. 512 (1941);

United States v. Schupper Motor Lines, Inc., 77 F. Supp. 737 (1948);

United States v. Kessler, 63 F. Supp. 964 (E.D. Pa.).

In the *Alabama* case, supra, the admissibility of motor carrier records was attacked on the ground of "unlawful search and seizure". After reviewing the applicable law and regulations, particularly the provisions of Title 49 U.S.C. Sec. 320(d) the Court admitted the records and, in denying the motion to suppress, said:

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[8]See Appendix—Item 7 for full text of Regulation authorizing inspection of records.

"Our conclusion that there is nothing illegal or unconstitutional in the procedure of discovery pursued by the Commission as complained of in the motion to suppress, is necessarily and properly influenced by the fact that motor carriers operating under the franchises provided in our federal statutes are public utilities. As such, they are subject to the highest degree of accountability to the public, the public being represented by the administrative agency charged with supervision of their business, in this case the Interstate Commission. This accountability naturally allows the motor carrier less protection and privacy than the ordinary citizen enjoys in his private business. To accord a public utility the same constitutional guarantees of privacy would frustrate the public welfare and tend to minimize the public interest in the utility. Far from being condemned as unconstitutional, complete inspection by duly authorized agents of the Commission must be expected by motor carriers as part of the price of functioning in the utility field."

In the *Deardorff* case, supra, the Court held that a summary prepared by a government special agent of facts and figures taken from business records in the main office of a motor carrier was admissible.

In each of these cited decisions the Court recognizes a doctrine of necessity. A common carrier could defeat the very purpose of regulation if it failed to issue appropriate shipping documents at the time the transportation is performed. The legislation anticipated this factor and provided the methods to avoid it.

In this case the appellant challenges the admissibility of the freight bills on the ground of hearsay. It claims hearsay, first, because the descriptive information contained on the bills was copied from the descriptive information contained on the originating carrier's (Wells Cargo) freight bills; and, second, it was compelled to accept the word of others in the preparation of its own freight bill because the vehicles were sealed during all the time they were in its possession and consequently no opportunity was afforded to inspect the contents and confirm the identity thereof. (Appellant's Brief 43.)

The record shows that the freight bills admitted in evidence were made and issued by the appellant at its Oakland terminal who copied thereon the description identifying the articles as stated on the originating carrier's freight bill. (Tr. 159, 160.) Appellant followed the usual custom and practice of the motor carrier industry in preparing freight bills from the information contained on the shipping documents of others—*without* personal inspection of each article of each shipment transported. Appellant's traffic manager, Mr. I. W. Shepherd, testified that it handled between 40,000 and 60,000 separate shipments during the month of September, 1950. (Tr. 182.) Appellant did not challenge the contents of the sealed trailers containing the shipments concerned herein, as described by the Government bills of lading and the Wells Cargo freight bills. On the contrary, said descriptions were accepted by appellant in preparing

further freight bills, and in transporting the shipments to point of destination.

Appellant's contention that because the cargo moved in sealed vehicles, it had no alternative but to accept the articles as described by others, is without merit. When transporting explosives for any shipper it is the usual practice from a safety standpoint to seal all vehicles which are physically possible to seal. There is no evidence that the shipments out of the government ammunition depot at Herlong were "guarded" or a military secret, although appellant would have the Court believe that the military officials might have deliberately misdescribed the articles to avoid the disclosure of a military secret. (Tr. 77.) A carrier may inspect the contents of a sealed vehicle whenever it so desires and if inspection is refused, transportation may be declined. On the face of the Wells Cargo freight bill and the Government bill of lading appellant did not have authority to undertake transportation of the shipments in question. Appellant deliberately and wilfully undertook the transportation notwithstanding lack of authority.

Silver Fleet Motor Express v. Abe Prebul, 7 Fed. Carrier Cases 80579 (not found reported elsewhere).

The law necessarily contemplates that when a carrier executes and issues the required shipping document, such shipping document becomes *ipso facto* the best evidence of the fact which it represents, regardless of the source of information. To discover a motor carrier in the act of violating the law is extremely

unusual. Constant surveillance of each motor carrier is neither possible nor practicable. Violations when detected, such as here, have usually been committed months previously.

Appellant was charged with violating its operating authority by shipping articles herein concerned. The best evidence of its deliberate act is the freight bills which it prepared for the shipment. Appellant therein described certain *explosives* which the Explosives and Other Dangerous Articles Tariff Nos. 6 and 7 (Ex. 24 and 23) were classified as *Class A* and *Class B* explosives. Tariff No. 6 (Ex. 24) uses the words "Class A Explosives, dangerous"; "Class B Explosives, less dangerous". Tariff No. 7, Ex. 23, uses the words "Class A Explosives, detonating, maximum hazard"; "Class B Explosives; flammable hazard". There was, and could be, no question that appellant was fully informed of the nature, danger and explosive characteristics of the shipments. As a matter of law, appellant was charged with notice of the contents imposing upon it responsibility for all precautionary measures required by the regulations incident to undertaking transport. Likewise they were charged with notice as to their operating authority.

See:

Lehigh Valley v. State of Russia, 21 F. (2d) 396, 403, Cert. den. 275 U.S. 571, 72 L.Ed. 432.

Appellant in its brief at page 57 states, "appellant as a common carrier, had a duty to accept the goods for transportation if it could do so under its certifi-

cate". Appellant also had a duty not to accept goods for transportation if it could not do so under its certificate. Appellant did not have authority to transport the goods herein. It deliberately did transport said goods and now seeks to avoid responsibility on a spurious claim of hearsay.

4. Appellant transported the prohibited commodities—dangerous explosives—knowingly and willfully within the meaning of the statute.

The Interstate Commerce Act, Part II (49 U.S.C. Sec. 306(a)) is remedial legislation and should be liberally construed to effect its intended purpose. (*I.C.C. v. A. W. Stickle & Co.,* 41 F. Supp. 268.) The judicial construction of the words knowingly and wilfully was early considered in *Armour Packing Co. v. United States,* 153 Fed. 1, affirmed 209 U.S. 56, in a case involving violations of the Interstate Commerce Act. The Court said, page 23:

> "* * * a corrupt purpose, a wicked intent to do evil, is indispensable to conviction of a crime that is morally wrong. But no evil intent is essential to an offense which is mere malum prohibitum. A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense, which is not malum in se."

The authorities in support of this decision, are, literally, too numerous to mention. However, in *Boone v. United States,* 109 Fed. (2d) 560, the defendant had two different types of rates in effect, a proportional rate and a transit rate—each applying separately to different situations. The transit rate was

the lowest. Defendant was charged with applying the transit rate in a situation which required the application of the proportional rate and was convicted of granting concessions under the Elkins Act. Boone contended that the tariffs were confusing and that he acted under an honest belief that the transit rates were applicable—upon a finding of guilty the Court said:

> "The penalty is not imposed for unwitting failure to comply with a statute but for intentionally, carelessly, knowingly or voluntarily disregarding the provisions of the act, and its violation requires neither evil purpose nor criminal intent."
>
> *U. S. v. Illinois Central Railroad Co.,* 303 U.S. 239, 243, 82 L. Ed. 773.

See also:

Ellis v. U. S., 206 U.S. 246, 257.

In *Houff Transfer, Inc. v. United States, et al.,* 105 Fed. Supp. 847 the Court had before it a matter involving the transportation of explosives and other dangerous articles, and said:

> "The regulations at present may be found in CFR, Title 49, Parts 71-78. This is, of course, a part of the law governing motor carriers and of which they are bound to have knowledge."

See also:

United States v. Gunn, et al., 97 F. Supp. 476;
Kempl v. United States, (8th Cir.) 151 F. (2d) 680;

Boyce Motor Lines v. United States (1951), 188 F. (2d) 889 (C.A. 3) Aff. (1952), 342 U.S. 337.

Appellant contends that it did not know what the words dangerous explosives meant and that it sought the advice of legal counsel for the purpose of "clarification". (Tr. 188; Tr. 193, Ex. 2.) The attorney consulted was William B. Adams, an Interstate Commerce Commission practitioner of twenty years' standing. Mr. Shepherd testified (Tr. 190) that the services of Mr. Adams were employed for the purpose of filing the application (Ex. 2) with the Interstate Commerce Commission under its established procedures. Appellant argues at page 56 of its brief: "Appellant took prompt steps in an effort to ascertain and clarify the meaning of the language". Appellant did not make application "to ascertain and clarify the meaning of the language"—it applied for an *extension* of authority. An application for interpretation or clarification of a certificate is distinctly different from an application for extension of authority. (*Builders Express, Inc.—Interpretation of Certificate,* 51 M.C.C. 103; *Convoy Co.—Interpretation of Certificate,* 52 M.C.C. 191.)

Exhibit 2 is the application for an extension of operating authority by which the Commission was requested to remove the exception contained in appellant's certificate, namely, *dangerous explosives.* This original application, Docket No. MC-55905 (Sub-No. 34) was filed with the Commission on October 24, 1950, some 45 days after the date of the first count

alleged in the information. The appellant amended its application on January 9, 1951. The amended application requested extension of appellant's existing operating authority to include:

> "Explosives of all types, including *dangerous explosives* * * *"

On December 26, 1951 the Commission entered its order (part of Ex. 2) denying the application. In making its decision the Commission observed that:

> "Applicant can now transport *dangerous explosives* between Tacoma and Ellensburg, Washington, and Missoula, Montana; between Spokane and Coeur d'Alene, Idaho; between Tacoma and Steilacoom, Washington * * *"
>
> "During World War II it transported *dangerous explosives* under temporary authority over its authorized routes.
>
> "Applicant asserts that it has been tendered shipments of *dangerous explosives* which it was unable to accept because it lacked appropriate authority to effect delivery." (Italics supplied.)

The sum and substance of the foregoing is that the appellant knew that some of the articles which it was transporting out of Oakland, California were Class A and Class B explosives, and as such they were dangerous explosives for the transportation of which it did not have authority. The application for extension of authority is conclusive as to appellant's knowledge.

B. THE REMAINING ARGUMENTS ADVANCED BY THE APPELLANT ARE WITHOUT MERIT.

1. Submission of a copy of appellant's certificate to appropriate military authorities in Washington is immaterial. Transportation for the United States Government, such as under consideration here, is within the sole jurisdiction of the Interstate Commerce Commission.

In appellant's brief (pages 16 and 57) mention is made of the fact that "before handling any traffic of any kind from the Sierra Army Ordnance Depot at Herlong, California, appellant submitted a copy of its certificate to the appropriate military authorities in Washington, D. C." It is stated also that Section 22 quotations (rates) were submitted to Army officials. The implication is that the rates were agreed upon and accepted and that the transportation was approved.

It is true that under Section 22, Part I, Interstate Commerce Act, carriers can transport property for the government at "free or reduced rates" which need not be filed with the Interstate Commerce Commission. However, in the performance of a transportation service for any shipper *including* the government or any independent agency thereof, the carrier is subject at all times to the certificate provisions of the Interstate Commerce Act, Part II (49 U.S.C. Section 306(a)).

Mack Brothers Extension—July 17, 1952 (Not printed in Commission Reports), 9 Carrier Cases 32,533);

W. O. Harrington—Purchase—Strickland, 57 M.C.C. 303.

When a carrier files rates with the Interstate Commerce Commission covering transportation which it is not authorized to perform, such rates are immediately rejected or cancelled by the Commission.

Powder, from Parsons, Kan. to East Alton, Ill., 52 M.C.C. 471—March 13, 1951.

Appellant on page 57 of its brief, in the last sentence of the paragraph under "2. Statement of Argument" states: "Appellant, as a common carrier, had a duty to accept the goods for transportation if it could do so under its certificate". Appellant admittedly charges itself with the responsibility of conducting its operations within the authority of its operating certificate. Such responsibility reposes solely upon appellant. The "military authorities" have no jurisdiction to alter this operating authority of appellant or any other carrier. The Interstate Commerce Commission is the sole determinant in these matters.

2. The "Primary Jurisdiction" doctrine is inapplicable.

Appellant has charged error to the lower Court in that the Court undertook to make an independent finding of fact as to the meaning of the words "except dangerous explosives" as used in the certificate of convenience and necessity, contrary to established rules of law that the primary jurisdiction to define said words is with the Interstate Commerce Commission. Appellant states on page 24 of its brief:

> "Pursuant to a principle of law which has come to be known as the 'primary jurisdiction doctrine' first announced in *Texas & Pacific R. Co. v.*

> *Abilene Cotton Oil Co.,* 204 U. S. 426, 27 S. Ct. 350, 51 L.Ed. 553 (1907), the United States Supreme Court has held that in situations of the general type here presented primary resort to the Interstate Commerce Commission is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission."

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, involved a suit by an oil company to recover a sum of money claimed to have been the payment of an unjust and unreasonable rate. The question was "whether consistently with the act to regulate commerce there was power in the Court to grant relief on the finding that the rate charged for an interstate shipment was unreasonable." The lower Court said yes. The Supreme Court held that a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce primarily make redress through the Interstate Commerce Commission which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable * * * and reversed and remanded. On page 439, the Court said:

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these

subjects was among the principal purposes of the act."

* * * * * * *

"And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law."

Page 440.

"When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a pref-

erence or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced."

In *Great Northern Ry. v. Merchants Elevator Co.,* 259 U.S. 285, Justice Brandeis distinguished between controversies which involve only questions of law and those which involve issues, essentially of fact or call for the exercise of administrative discretion, and held that cases involving no question of fact and no question of administrative discretion are within the Court's jurisdiction without preliminary resort to the Interstate Commerce Commission. On page 294 the Court said:

> "In the case at bar the situation is entirely different from that presented in the *American Tie & Timber Co. Case,* or in the *Loomis Case.* Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

In *Civil Aeronautics Board v. Modern Air Transport,* 179 F.2d 622 (CA-2),[9] a preliminary injunction was granted restraining Modern Air from engaging in air transportation in violation of Sec. 40(a) of

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[9]Appellant has erroneously cited the case as of the 9th Circuit Court of Appeals.

the Civil Aeronautics Act of 1938, 4 U.S.C.A. Sec. 48(a). Defendant relied on "what has come to be known as the doctrine of primary administrative jurisdiction." At page 624 the Court said:

> "Under this doctrine the courts will not determine a question within the jurisdiction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. 42 Am. Jur. 698-702. This self-denying doctrine has been used by the courts as a ground for refusing to decide the difficult issues of reasonableness of a rate or fairness of a regulation which fall within the area of special competence of the particular administrative agency and for which the agency is said to have primary jurisdiction. 51 Harv. L. Rev. 1251. But this doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus it has been continuously asserted that courts have original jurisdiction to interpret tariffs, rules, and practices where the issue is one of violation, rather than reasonableness. W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., 299 U.S. 393, 57 S.Ct. 265, 81 L.Ed. 301; Texas & P. R. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578; Burrus Mill & Elevator Co. of Oklahoma v. Chicago, R. I. & P. R. Co., 10 Cir. 131 F.2d 532, certiorari denied 318 U.S. 773, 63 S.Ct. 770, 87 L.Ed. 1143."

On page 37 of its brief appellant states: "The doctrine applies to criminal proceedings as well as

in civil matters", and cites *U. S. v. Pacific & Arctic R. & N. Co.,* 228 U.S. 87, and *Hancock Mfg. Co. v. U. S.,* 155 F.2d 827 (CA-6 1946).

It is difficult to determine what comfort appellant derives from these two cases. In *U. S. v. Pacific & Arctic Co.,* a six count indictment for alleged violation of the Sherman Antitrust Act and the Interstate Commerce Act reached the Supreme Court after a demurrer in the lower Court had been sustained. Counts 3-4-5 are the only ones with which we need be concerned. Unlawful discrimination in the transportation of freight and passengers is charged. The Court said, on page 107: "* * * the Interstate Commerce Act * * * is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission." And on page 108: "The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases; and also the sufficiency of its powers to deal with the circumstances set forth in the indictment."

In *Hancock Mfg. Co. v. U. S.* an information containing eighteen counts, charged unlawful, knowing solicitation, acceptance and receipt of a concession in that the carrier did transport pieces of automobile parts, etc., not otherwise indexed in the governing

classification and charged and collected from the defendant less than the charge and compensation specified in the tariff. The case turned on whether the parts were "blanks, stampings, or unfinished shapes *in one piece* not further finished" and were *"in one piece not advanced in the state of manufacture beyond the stamping process."*

The difficulty from the evidence was that the word "stampings" was indefinite and uncertain in its meaning and "fixes no immutable standard" which a Court may recognize as a matter of law. The Court said, page 831: "In reality it presented a question of fact the determination of which in a civil case has been adjudged to be with a body of experts." The Court further said: "* * * the evidence as presented is not sufficient to support a verdict of guilty beyond a reasonable doubt." The judgment was reversed "* * * not only upon the grounds that the word 'stampings' is too vague and indefinite but that the evidence submitted is insufficient to support a verdict beyond a reasonable doubt."

The operating certificate of appellant herein contained an exception to a general commodity authority. This exception was "except dangerous explosives." The applicable tariffs, Nos. 6 and 7 (Exh. 24 and 23) placed each of the articles transported and on which appellant was convicted, in Class A or Class B explosives. Tariff No. 6 as to Class A explosives contained the additional word "dangerous", and as to Class B explosives the additional words

"less dangerous". In Tariff No. 7, the tariff controlling at the time of the violations, the word "dangerous" as to Class A explosives was changed to "detonating, maximum hazard" and as to Class B explosives the words "less dangerous" were changed to "flammable hazard". Appellant's contention is that by these changes appellant became *confused* and *uncertain* as to what were "dangerous explosives" under its operating certificate; that confusion and uncertainty is the natural condition of these words and that it is the Commission's "primary jurisdiction" to brush off the dust of confusion.

It is difficult to attribute sincerity to appellant's contention. The commodities concerned were continuously classified as Class A or Class B explosives. The change of the words "dangerous" and "less dangerous" to "detonating, maximum hazard" and "flammable hazard" does not detract from the "dangerous" nature of Class A and Class B explosives, but rather enhances it.

The determination of the classification of various dangerous commodities has been accomplished by the Commission over the years after repeated scientific inquiry. There is and can be no doubt, uncertainty or confusion that the commodities classified as Class A and Class B explosives are dangerous. There was no doubt in appellant's mind as is clearly shown by the testimony and the application for extension of operating authority. Determination in first instance of what articles constitute explosives and dangerous articles for which the Interstate Commerce Commission must

formulate regulations for safe transportation rests with the Commission, and the Court should not attempt wholesale review of Commission regulations for purpose of amendment at the instance of one whose certificate of authority precludes carriage of all articles so classified. *Houff Trans. Inc. v. U. S.*, 105 F. Supp. 847.

VIII.

CONCLUSION.

Appellee submits that guilt in this case was established beyond any reasonable doubt, and that the judgment of the District Court is correct and should be sustained.

Dated, San Francisco, California,
October 27, 1952.

CHAUNCEY TRAMUTOLO,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

ITEM 1.

Interstate Commerce Act, Part II (49 USC 306 (a)), provides:

(a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation: * * *

ITEM 2.

Interstate Commerce Act, Part II (49 USC 322 (a)), provides:

(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

ITEM 3.

49 Code of Federal Regulations 77.823—Marking on motor vehicles and trailers other than tank motor vehicles—provides:

(a) Every motor vehicle transporting any quantity of explosives, class A, poison gas, class A, or radioactive material, poison class D requiring red radioactive materials label; and every motor vehicle transporting 2,500 pounds gross weight or more of explosives, class B, flammable liquids, flammable solids or oxidizing materials, corrosive liquids, compressed gas, class B poisons, and tear gas, or 5,000 pounds gross weight or more of two or more articles of these groups shall be marked or placarded on each side and rear with a placard or lettering in letters not less than 3 inches high on a contrasting background as follows:

(1) Explosives, class A.....EXPLOSIVES
(2) Explosives, class B .....DANGEROUS
(3) Flammable liquid .....DANGEROUS
(4) Flammable solid .....DANGEROUS
(5) Oxidizing material .....DANGEROUS
(6) Corrosive liquid .....DANGEROUS
(7) Compressed gas .....COMPRESSED GAS
(8) Poison gas, class A.....POISON GAS
(9) Tear gas .....DANGEROUS
(10) Poisons, class B .....DANGEROUS
(11) Dangerous, class D poison .....DANGEROUS—RADIOACTIVE MATERIAL

ITEM 4.

49 Code of Federal Regulations 197.1. Driving rules—(a) Motor vehicles not to be left unattended:

No driver of a motor vehicle transporting any explosive or other dangerous article shall leave such motor vehicle unattended upon any public street or highway, except when such driver is engaged in the performance of normal operations incident to his duties as the operator of the vehicle to which he is assigned; nor shall any driver leave unattended any motor vehicle loaded with dangerous or less dangerous explosives upon any public street or highway, or elsewhere during the course of transportation. Nothing contained in this section shall be construed to relieve the driver of any requirement for the protection of any such motor vehicle left unattended upon any public street or highway, as provided in Part 193 of this chapter.

ITEM 5.

49 Code of Federal Regulations 172.1—Information to be shown—provides:

(a) Every common carrier by motor vehicle subject to the jurisdiction of this Commission shall, on and after the first day of January, 1937, cause to be shown on the face of each and every receipt or bill of lading issued for the transportation of property by such carrier in interstate or foreign commerce, information which shall include the names of the consignor and consignee; the points of origin and desti-

nation; the number of packages, description of the articles, and weight, volume of measurement (if the lawfully applicable rates or charges are published to apply per unit of weight, volume or measurement) of the property received; and a record of this information shall be kept by the carrier by the preservation of a copy of such receipt or bill of lading.

(b) Every common carrier by motor vehicle subject to the jurisdiction of this Commission shall, on and after the first day of January, 1937, when collecting transportation charges, issue a freight or expense bill covering each shipment, and the original of such freight or expense bill shall be receipted on payment of the transportation charges and furnished to the shipper or the receiver, whichever may pay the charges; and shall cause to be shown on the face thereof the names of the consignor and consignee (except that as to reconsigned shipments the freight or expense bill shall not show the name of the original consignor); the date of shipment; the points of origin and destination (except that as to reconsigned shipments the freight or expense bill shall not show the original shipping point unless the final consignee pays transportation charges upon such original shipping point; the number of packages, description of the articles, and weight, volume or measurement of the property transported (if the lawfully applicable rates or charges are published to apply per unit of weight, volume or measurement); the exact rate or rates assessed; the total charges to be collected including a statement

of the nature and amount of any charges for special service and the points at which such special service was rendered; the route of movement indicating each carrier participating in the transportation service, and the transfer point or points through which the shipment moved; and a record of this information shall be kept by the preservation of a copy of such freight or expense bill.

ITEM 6.

49 Code of Federal Regulations 77.819—Certificate —provides:

(a) Except as provided in this section, no motor carrier may accept for transportation or transport any class A or class B explosives, blasting caps or electric blasting caps in any quantity, or any dangerous articles requiring label as prescribed by Part 73 of this chapter, unless it be certified to him by the shipper's name inserted in the certificate on the label or by the following certificate over the written or stamped facsimile signature of the shipper or his duly authorized agent in the lower left-hand corner of the manifest, memorandum receipt, bill of lading, shipping order, shipping paper, or other memorandum:

> This is to certify that the above named articles are properly described, and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.

(b) For the relief of shippers from multiplicity of certifications required for packages which may move by various means of transportation, shipments may be certified for rail, motor vehicle, water, or air transportation by adding to the certificate required on the shipping document "and the Commandant of the Coast Guard", or "and the Civil Air Regulations", as the case may be.

49 Code of Federal Regulations 77.820—Waybills, manifests, etc.—provides:

(a) The waybill, manifest, dispatch, memorandum receipt, bill of lading, transfer sheet, or interchange record, when prepared for shipments and used for transferring such shipments to a connecting carrier, must properly describe the articles by name as shown in 72.5 of this chapter, and show color of label applied.

ITEM 7.

49 Code of Federal Regulations 177.1—Examination of records and accounts—provides:

Each and every motor carrier and broker subject to Part II of the Interstate Commerce Act, and receivers, trustees, and representatives having control, direct or indirect, over or affiliated with any such motor carrier or broker, upon the demand of a special agent or an examiner of the Commission, and upon the presentation of proper credentials, shall forthwith permit such special agent or examiner to inspect and examine all such lands, buildings, or equipment of

motor carriers and brokers used in connection with interstate or foreign operations, and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing and kept or required to be kept by motor carriers and brokers subject to the act, and permit such special agent or examiner to make notes and copies of such papers as he deems wise.

(49 Stat. 546, as amended; 49 U.S.C. 304. Interprets or applies 49 Stat. 563, as amended; 49 U.S.C. 320 [4 F.R. 4191].)

No. 13403

United States
Court of Appeals
For the Ninth Circuit

WEST COAST FAST FREIGHT, INC., a corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Reply Brief of Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division.

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Reply Brief of Appellant

Appeal from the United States District Court for the Northern District of California, Southern Division.

I.

PRELIMINARY STATEMENT

In this Reply the several arguments in the Brief of Appellee will be discussed in the order therein presented. Footnote reference is made at the beginning of each part hereof to the portion of the Brief of Appellee being considered.

II.

COMMENT UPON THE STATEMENT OF THE CASE[1]

Two somewhat related statements in appellee's statement of the case require some comment. They are: "The contents of the trailers and the shipments therein were identified by government bills of lading and the Wells Cargo Freight bills. . . . A description of the contents as contained in the Wells Cargo Freight bills and the government bills of lading was accepted by appellant without challenge." (Appellee's Brief, p. 3.)

It is respectfully submitted that, except to a very limited extent, neither of these statements can be supported by the record. As to Counts 2, 3 and 9 some government bills of lading are of record. As to Count 3 there is a bill of lading of Wells Cargo. A variation exists between the government bill and the Wells Cargo bill. (Ex. A.) The only other evidence appellant can discover which could possibly be taken as support for the statements made is certain general information furnished by Mr. Strock. (Tr. 160-161).[2] This testimony must, however, be read in its relation to other testimony. (Tr. 171, 196-203.)

Appellant respectfully submits, that except to the limited extent set forth above as to Counts 2, 3 and 9

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[1]Appellee's Brief, Item IV, pp. 2-4.
[2]References are to pages of the transcript.

there is no evidence of record to support the statements above quoted that the contents of the trailers were identified by bills of lading or that appellant used any such documentation as the actual basis for the preparation of the particular freight bills here the subject of examination. Upon this record what may have been the actual source of the information upon appellant's freight bills is entirely a matter of conjecture.

III.

APPELLEE'S STATEMENT OF THE QUESTION FAILS TO PRESENT THE ISSUE[3]

Appellee urges that the sole question here presented is the sufficiency of the evidence to sustain the conviction. Other and more basic issues are involved. The "primary jurisdiction" doctrine raises a jurisdictional question. If determined in favor of the appellant the question of sufficiency of the evidence does not arise.

Related to the question of sufficiency of the evidence, but distinct from it in some respects, is the question of the propriety of the action of the trial court in admitting Exhibits 3-22.[4] Virtually the entire case of the United States is predicated upon the information contained in these documents. If they were improperly received, no other evidence to prove either

[3]Appellee's Brief, Item V, p. 4.

[4]The phrase "Exhibits 3-22" is used for purpose of brevity to identity the exhibits within this range of numbers relating to counts of the information which are the subject of appeal.

the transportation or the nature of the products moved remains. Under the circumstances the insufficiency of the evidence, without these exhibits, is conclusively established.

IV.

REPLY TO THE ARGUMENTS OF APPELLEE

1. Reply to the argument that the language contained in appellant's certificates is stated in the form and language common to Commission practice.[5]

Appellant has never contended at any point in this proceeding that the language contained in its certificates is an "innovation". Appellant is fully aware that the words "except dangerous explosives" appear in many certificates issued by the Interstate Commerce Commission. The language used in appellant's certificates is not, however, one which can be said to be uniform or standard. There are set forth in the Appendix as Item 1 thereof a number of decisions of the Commission using other language designed to describe exceptions of the same general type.

Appellant does urge, in connection with the primary jurisdiction argument, that the words "except dangerous explosives" do have a questionable meaning. More important, their meaning raises a question of fact and not a question of law. The questionable meaning of the language used will be discussed below.

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[5]Appellee's Brief, Argument A.1., pages 5 and 6.

2. The meaning of the term "dangerous explosives" has not been so defined by the Commission that its meaning can be said to have been fixed as a matter of law.[6]

The question of the meaning of the term "dangerous explosives" cannot be divorced from the question of the "primary jurisdiction" doctrine as appellee attempts to do.

Appellant has been charged with the transportation of certain commodities described by class. Appellant has a certificate which authorizes the transportation of commodities generally, a term, as appellee points out, considered by the Commission to include all commodities other than those expressly excepted. The certificate of appellant contains an express exception against the transportation of "dangerous explosives". The problem is immediately presented, therefore, as to the meaning of the language used in the exception.

The problem is not whether or not the trial court could reasonably come to the conclusion that it did upon the evidence before it, but rather whether or not the court should have undertaken the determination at all.

In the appellant's brief considerable time has been devoted to the statements of the principles involving the applicability of the primary jurisdiction doctrine. Counsel for the appellant believe it will suffice here to point out, based upon the citations heretofore given,

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[6]Appellee's Brief, Argument A.2., pages 7 to 13.

that the trial court was justified in proceeding with the trial of the action only if it appeared: (a) that the words requiring definition were used in their common and ordinary meaning or, (b) if the words used had been so clearly defined by the Interstate Commerce Commission that the court could say as a matter of law what their meaning is to be in every court proceeding which might involve their definition.

Appellee makes no attempt to justify the action of the trial court upon the basis that the words "dangerous explosives" are used in their common or ordinary sense. The contention is that the definition of the term is so clearly established by regulations and Commission decisions that no confusion in definition possibly could remain.

Under the regulation of the Interstate Commerce Commission explosives are defined as falling within two classes: (a) forbidden explosives, and (b) acceptable explosives. (Ex. 23, §§ 73.50, 73.51, 73.52.)[7] It is only those explosives which a carrier may accept for transportation, i.e., acceptable explosives, which are subdivided into classes A, B and C respectively. These regulations as they exist today nowhere define what constitutes a "dangerous explosive". Superseded regulations at one time did use the words "dangerous explosives" to define those explosives which were then classified as Class A.

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[7]Throughout this Reply reference to effective regulations will be to the appropriate section number as it appears in Exhibit 23. For cross-reference to the official regulation see Volume 49 Federal Code of Regulations at the appropriate section number which is in all instances the same as the section number assigned in Exhibit 23.

Appellant is aware that in *Strickland Transportation Co., Inc.—Extension—Dangerous Explosives,* 49 M.C.C. 595 (1949)[8], the Commission did state that under the regulations *as they then existed* those explosives which were described as "dangerous" and "less dangerous" should be considered as "dangerous explosives", as those terms were used in certificates issued to motor carriers. Appellant desires in this connection to call attention again to the numerous decisions of the United States Supreme Court in which it has been held that determinations in decisions of the Interstate Commerce Commission and other administrative agencies dealing generally with the subject under consideration in the particular case do not preclude the necessity for the application of the "primary jurisdiction" doctrine where it is otherwise called for.

Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U. S. 304, 33 S. Ct. 928, 57 L. Ed. 1494 (1913);

Midland Valley R. Co. v. Barkeley, 276 U. S. 482, 48 S. Ct. 342, 72 L. Ed. 664 (1927);

U. S. Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408 (1932);

St. Louis B & M R. Co. v. Brownsville Nav. Dist., 304 U. S. 295, 58 S. Ct. 868, 82 L. Ed. 1357 (1937).

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[8]Hereafter referred to as the *Strickland case.*

Appellee assumes in its argument that the words Class A and Class B as used in the *current* regulations are synonmous with the words "dangerous" and "less dangerous" as used in the *superseded* regulations. In its amendment of its regulations effective May 3, 1950 the Interstate Commerce Commission changed §73.52 only in that it removed therefrom the words "dangerous" and "less dangerous". (Compare Ex. 23, §73.52, Ex. 24, §51.) The position for which appellee contends requires the assumption, wholly without basis, that this change in language, *the only change made in the cited section,* had no substantive purpose. The argument also overlooks the fact, as has been pointed out in appellant's opening brief, that §73.53 and subsequent sections of the regulations were at the same time changed in a number of substantial particulars as to the specific tests which should be applied to determine within which classification a particular commodity should fall. (Compare Ex. 23, §§ 73.53, 73.88, 73.100 and Ex. 24, §§ 54-75.) The changes in the regulations above noted were made subsequent to the decision in the *Strickland case.* These changes were substantive in character.

The issue of the meaning of the words "dangerous explosives" cannot be divorced from the jurisdictional question. The question here at issue is not whether the trial court came to a reasonable conclusion as to the meaning of the terms on the basis of its own judgment. The question is whether or not the regulations and decisions of the Commission were so clear and certain

that as a matter of law no definition other than that applied by the trial court would be possible. It is respectfully submitted that no such degree of certainty exists; that the decision of the trial court was one of fact on a technical question; that other courts presented with the same facts might reasonably reach a different conclusion as to the meaning of the words. The question being one of fact and not of law the proper procedure under the "primary jurisdiction" doctrine is the dismissal of the case.

3. The freight bills made and issued by appellant were not competent evidence to prove the fact of transportation and the explosive characteristics of the products.[9]

Appellee in its argument A.3 confuses two separate and distinct issues. The first, is the propriety of admitting at all Exhibits 3-22 as proper documents under the regular course of business exception to the hearsay rule. The second, is the sufficiency of those documents, assuming their admissibility, standing alone to prove the fact of transportation and the explosive properties of the articles transported.

The business records doctrine is founded ultimately upon the presumption that some person in the ordinary course of business and with knowledge of the facts made the entries or provided the information from which the entries could be made. Here the presump-

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[9]Appellee's Brief, Argument A.3, pp. 13 to 19 inclusive.

tion that the person making up the freight bills of appellant had knowledge of the facts, is directly refuted by the information of record that the trucks were sealed. The person making the entries could not have known the facts. Nor is there any basis for assuming in the record that the information came from a person called upon to furnish reliable information. The record is silent as to the source of the information. We can conjecture but we do not know. Before the presumption would be justified that the freight bills of the defendant are probative evidence of the facts recited the following assumptions, at least, would be required: (a) that some unknown person with sufficient knowledge of the explosive characteristics of the products shipped and of the terminology of the regulations properly classified the products according to appropriate language in the regulations; (b) that the judgment of this person was properly transcribed in the course of a business other than appellants to a bill of lading; (c) that the initiating carrier's representative properly transcribed the information from the government bill of lading; (d) that the bill of lading and this additional documentation of the initiating carrier accompanied the shipment; (e) that it was made available to the persons who prepared Exhibits 3-22 inclusive; (f) that this information was used by such persons as the source of the documents prepared. The record is silent as to all of these important facts. The United States did not explain its failure to produce this information.

The mere fact that documents are kept in the course of business and that they must be kept as a matter of law for certain purposes does not *ipso facto* make them admissible in evidence for all purposes.

> *Schmeller v. United States,* 143 Fed. (2d) 544, (CCA-6) (1944).

Appellee has cited no case comparable on its facts to the fact situation here presented.[10] Admittedly, the freight bills of a common carrier are in *normal circumstances* business documents. Freight bills are, however, normally prepared only after the carrier has compared the contents of the shipment with the bill of lading and is in position to say that the descriptions contained in the bill of lading are correct. (Tr. 170.) In every case cited by appellee, the carrier had the opportunity to acquaint itself with the facts before preparing the shipping document. The bill of lading (not the freight bill) is the primary shipping document. In each of the cases cited by appellee, the bills of lading were presented in evidence. In the instant case the appellee relies entirely upon a document introduced by a person having no connection with the preparation of the document and no knowledge of the facts. It affirmatively appears that the person or persons preparing the document could not have had direct knowledge of the facts. Appellee has made no effort to show the source of the information or the reliability of that source as a basis

[10]The reference is to cases appearing at pages 14, 17, and 18 of the Appellee's Brief.

of information to the entrant. It is respectfully submitted that the cases heretofore cited by appellant in its opening brief are controlling of the fact situation here presented and that Exhibits 3-22 should not have been received in evidence.

Even assuming the admissibility of the documents for some purposes; it does not follow that they are, standing alone, sufficient proof of the fact of actual transportation and of the explosive properties of the articles transported. The courts have consistently held, that the fact as to what the article is in criminal cases of this type must be established by evidence independent of that which is contained in a business document.

United States v. Garvey, 150 Fed. (2d) 767 (C.C.A. 1st) (1945);

Schmeller v. United States, 143 Fed. (2d) 544, (C.C.A. 6th) (1944);

John Irving Shoe Co. v. Dugan, 93 Fed. (2d) 711, (C.C.A. 1st) (1937);

Lomax Transportation Co. v. United States, 183 Fed. (2d) 331, (C.C.A. 9th) (1950);

Reineke v. United States, 278 Fed. 724, (C.C.A. 6th) (1922);

Ellis v. United States, 57 Fed. (2d) 502, (C.C.A. 1st) (Cer. Den. 287 U. S. 635, 53 S. Ct. 85, 77 L. Ed. 550) (1932).

4. The transportation by appellant was not knowing or willful within the meaning of the statute.[11]

The essence of appellee's argument A.4 is that the offense charged is *malum prohibitum* and that as such no specific evil intent is required. Appellant at no time has contended that it is necessary for the United States in this case to prove an evil purpose in the appellant's actions. Appellant has contended consistently throughout this proceeding that it cannot be found to have willfully disregarded its certificates, where, as is here the case, the order which the United States contends it should comply with, is itself uncertain and indefinite.

As is pointed out in the opinion of the Supreme Court in a case cited by appellee, "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalty, and to guide the judge in its application and the lawyer in defending one charged with its violation."

> *Boyce Motor Lines, Inc. v. United States,* 342 U. S. 337, 96 L. Ed. 249, 252 (1951).

The question is whether or not the language of the certificate was sufficiently clear and certain to give notice of the required conduct. Neither independent study of the regulations nor the advice of counsel produced a satisfactory answer as to the meaning of the term "dangerous explosives." (Tr. 186-188.) De-

[11]Appellee's Brief, Argument A.4, pp. 19-22, also Argument B.1, pp. 23-24.

spite appellee's assertion the application filed did include, as to the territory here involved, a question of clarification of language. (Ex. 2, Tr. 193-196.)

Appellant respectfully submits that the language in its certificate was not clear and certain and that it did not contain, when read with the effective regulations, language which was sufficiently certain to place the appellant on notice of what it might transport and what it should not transport.

In its argument number B.4 appellee replies to a contention which has not been made. Appellant does not urge that interpretation of its certificate is for the military authorities and not for the Interstate Commerce Commission. The testimony that appellant's certificate was made available to the Department of Defense was cited as factual information related to the question of the willful character of the action charged. The circumstances surrounding the conditions under which this traffic began to move is but one in a series of things bearing upon the question of appellant's intent.

5. The "primary jurisdiction" doctrine is applicable.[12]

In its argument B.2, appellee contents itself with the citation to, and comment upon, certain of the cases already cited and discussed in the appellant's Opening Brief. The question of the place of the "primary jurisdiction" doctrine in this appeal has been discussed

[12]Appellee's Brief, Argument B.2, pp. 24-32.

both in the opening brief and in Part 2 above. The basic weakness in appellee's Argument B-2 is that appellee assumes that the term "dangerous explosives" has a fixed and certain meaning simply because a number of explosive items designated as being Class A or B under superceded regulations continue under the new classification in the same category. Such an assumption cannot be made without at the same time making the wholly unwarranted assumption that the Interstate Commerce Commission, although it changed the regulations to remove therefrom the words "dangerous" and "less dangerous", did not intend this change to have any meaning.

The changes in the regulations in question were changes not only in definition and classification but in the substantive requirements with respect to the explosive characteristics which a particular article must have in order to qualify under one classification or another. The *Strickland case* refers not to Class A, Class B and Class C explosives but to "dangerous," "less dangerous" and "relatively safe" explosives. With the *Strickland case* in hand a person engaged in an inquiry as to the meaning of the words "dangerous explosives" as used in a certificate can search in vain through the currently effective regulations for any provisions classifying them upon that basis. Other cases of the Commission cited by Appellee are not entirely consistent with the language of the *Strickland case.*

Novick—Extension of Operations—Explosives, 34 M.C.C. 693 (1942);
Buckingham Transportation Co.—Extension—Explosives, 46 M.C.C. 1098 (1946), 5 Fed. Car. Cas. Sec. 31,151.[13]

In view of all the circumstances, it is respectfully submitted that ample grounds exist for honest and reasonable differences of opinion as to what the meaning of the questioned language may be. Certainly the subject is not one so clear and certain that the meaning of the technical term can be considered to have been established as a matter of law. A fact question is involved in determining the meaning of the words "dangerous explosives". The "primary jurisdiction" doctrine should have been applied and the case dismissed.

[13]For comment upon the language of the cases cited see Item 2 of the Appendix.

V.

CONCLUSION

It has come to the attention of counsel for appellant that in the process of printing the opening brief certain typographical errors in references to sections of Exhibits 23 and 24 were made. To eliminate confusion and misunderstanding which might otherwise result appellant sets forth in Item 3 of the Appendix to this Reply the corrected references. No substantive changes in thought or context are involved.

Appellant respectfully submits that appellee has failed to meet or answer any of the basic contentions put forward by appellant as the basis of appeal herein.

Dated: Los Angeles, California
November 7, 1952

THEODORE W. RUSSELL
and GLANZ & RUSSELL
639 South Spring Street
Los Angeles 14, California.

Appendix

APPENDIX

Item No. 1

a. In a considerable number of decisions the Interstate Commerce Commission has used the term "except high explosives" rather than the term "except dangerous explosives" to accomplish substantially the same restrictions in "general commodity" certificates:

See:

M. F. Lyman Extension—Monticello—Bluff, Utah, 20 M.C.C. 346 (1939);

Rodney v. Jackson Common Carrier Application, 19 M.C.C. 199 (1939);

Tidewater Express Lines, Incorporated, Common Carrier Application, 8 M.C.C. 157 (1938);

Tri-State Motor Ways Common Carrier Application, 14 M.C.C. 249 (1939).

b. In other instances the Interstate Commerce Commission has used the phraseology "except high explosives" or "except dangerous explosives" after which a qualification is inserted allowing the transportation of certain explosives such as small arms ammunition which are classified in the regulations as relatively safe for transportation.

M. F. Neimeyer Common Carrier Application, 20 M.C.C. 609 (1939), (the language used is "except high explosives, except small arms ammunition");

Consolidated Shippers, Inc., Common Carrier Application, 28 M.C.C. 801 (1941), (the language used in the certificate although not specifically set forth in the reported decision, is "except dangerous explosives other than small arms ammunition and fireworks.")

Item No. 2

a. In *Novick—Extension of Operations—Explosives,* 34 M.C.C. 693 (1942),[1] the Interstate Commerce Commission in granting a certificate to the applicant stated:

> "Applicant will be granted authority for the transportation from and to all points on his present authorized routes of explosives classed as 'Less Dangerous—Class B' and 'Relatively safe Explosives—Class C' and other dangerous articles acceptable for transportation by motor carrier freight service, as provided in the Commission's explosive regulations, subject to any revision that may be made therein in the future. This will permit applicant lawfully to transport fireworks, small arms ammunition, inflammable liquids, *and many other articles classed in such explosives regulations as safe for motor carrier transportation,* which, under his present authority he may not do." (Emphasis added.) (p. 697.)
>
> Note: The language above quoted would seem to indicate that the Commission considered as "safe for transportation" all explosive items listed in

[1]Erroneously cited in Appellee's Brief as 37 M.C.C. 693 (1942).

Class B under the regulations. It is difficult to reconcile the language above quoted with the position here taken by the appellee.

b. The case of *Buckingham Transportation Co.—Extension—Explosives,* 46 M.C.C. 1098, (more fully reported in 5 Fed. Car. Cas. Sec. 31151) contains the following language:

> "The term 'explosives' used by applicants herein covers all forms of explosives, regardless of the hazard involved in transportation, from small-caliber ammunition and *black powder used by farmers and contractors* to highly dangerous explosives. The Commission's rules and regulations governing the transportation of explosives and other dangerous articles, including amendments thereof and supplements thereto, divide these products into 3 categories insofar as transportation hazard is concerned, namely, Class A, dangerous explosives, Class B, less dangerous explosives, and Class C, relatively safe explosives. The only form of exception presently specified in applicants' general commodity certificate is that of 'dangerous explosives' *from which it may be inferred that they already are authorized to transport all explosives not defined* as 'dangerous' in the Commission's rules and regulations." (Emphasis added.)
>
> Note: The foregoing quotation is clearly subject to the interpretation that only those explosives listed in the regulations as Class A-Dangerous are intended to be included in the exception in the certificate. The meaning of the term is further

confused by the reference to black powder as having a transportation hazard comparable to small arms ammunition. Under current regulations black powder would be a Class A and small arms ammunition a Class C explosive. (Ex. 23, Sec. 73.60, Sec. 73.101.)

Item No. 3

As is more fully explained in the Brief, the following omissions or errors have been discovered in reference to section numbers in Exhibits 23 and 24 in the text of the appellant's Opening Brief. There is set forth in the following table by reference to the appropriate page and line a statement of the text as it appears in the Opening Brief and a statement of the correct regulation reference:

Page 11, line 9, "75.50" should read "73.50".

Page 12, line 2, "(Ex. 73.53)" should read "(Ex. 23, § 73.53)".

Page 12, line 4, "(Ex. 23, § 83.88)" should read "(Ex. 23, § 73.88)".

Page 12, line 27, "§ 73.53(1)" should read "§ 73.53(i)".

Page 14, line 19, "(Ex. 4, § 51, p. 38.)" should read "(Ex. 24, § 51, p. 38)".

Page 14, line 25, "(Ex. 23, § 73.53(1)" should read "(Ex. 23, § 73.53(i))".

Page 28, line 31 (last line), "Section 73.801" should read "Section 77.801".

Page 29, line 10, "§ 75.5" should read "§ 72.5".

No. 13404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUDY VALENTINO LINAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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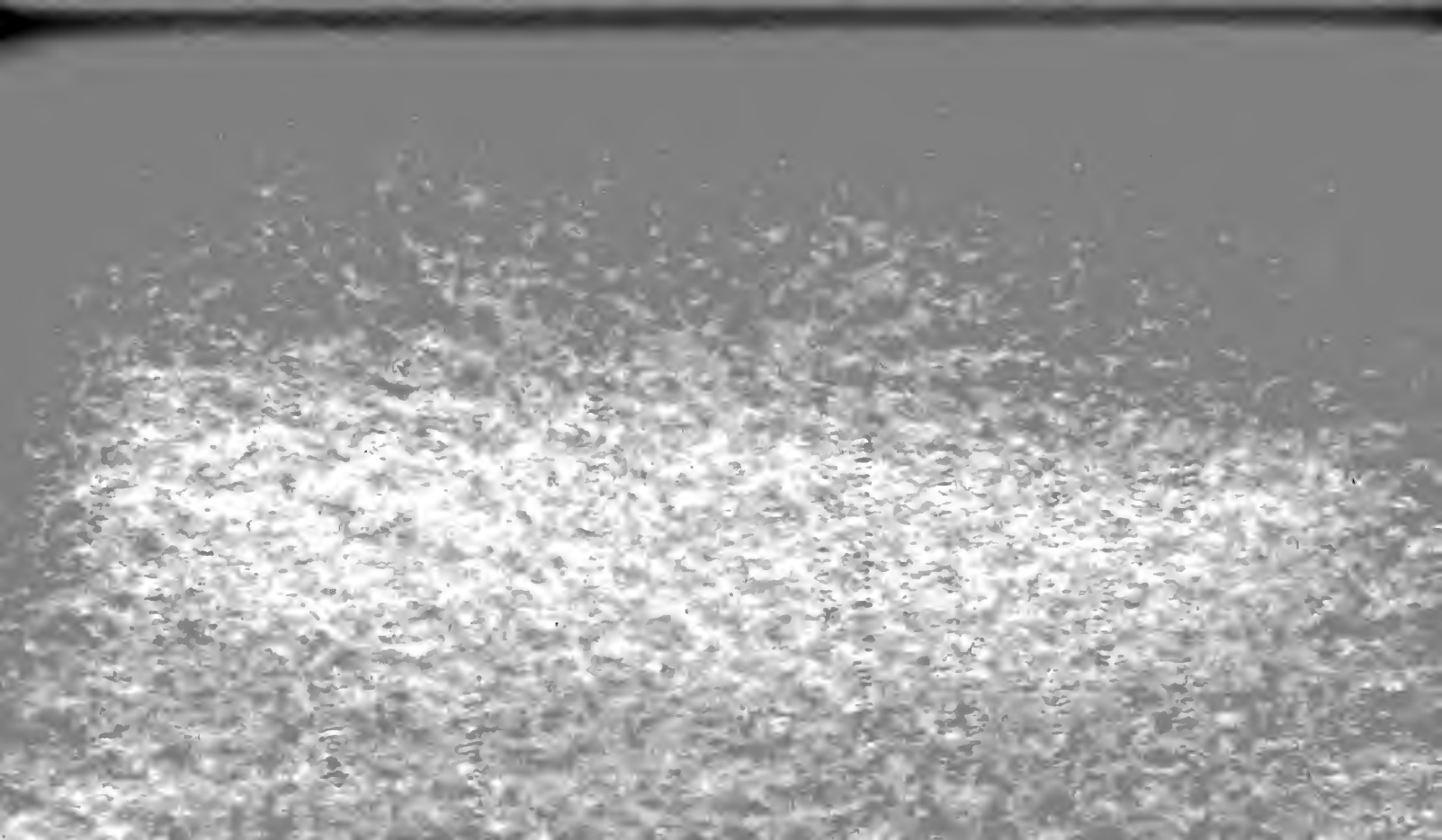

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No. 13404

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RUDY VALENTINO LINAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

This is an appeal from a judgment of conviction rendered against appellant in the United States District Court for the Southern District of California, Central Division, upon a finding of guilty, by the Court sitting without a jury, of violations of United States Code, Title 50, Appendix, Section 462. The Indictment is in one count charging (1) failure and refusal to be inducted into the Armed Forces of the United States as so notified and ordered to do.

The District Court had jurisdiction under United States Code, Title 18, Section 3231.

This Court has jurisdiction of the appeal under United States Code, Title 28, Section 1291.

Statement of the Case.

Appellant was indicted on April 2, 1952, under United States Code, Title 50, Appendix, Section 462, Selective Service Act, 1948, for refusing to submit to induction.

Appellant was convicted by the Court (Judge Ben Harrison) on April 28, 1952; he was sentenced by said judge to a three-year term of imprisonment on May 12, 1952, and is now in the Tucson, Arizona, Prison Camp.

The entire Selective Service file of the appellant was admitted in evidence in the case, as Government's Exhibit 1. On page 10, it reveals that in his Selective Service questionnaire, filed with the Board on or about the 14th day of March, 1949, the defendant did not claim to be a conscientious objector. The defendant was classified 1-A, in August, 1950 [p. 18]. He was ordered to report for Armed Forces physical examination on December 9, 1950; and on December 7, 1950, completed his special form for conscientious objectors, Form 150 [pp. 14-17]. He received a personal appearance on January 8, 1951 [Govt's Ex. 1, p. 49], and his classification of 1-A was continued. On February 14, 1951, the classification was affirmed before the appeal board [Govt's Ex. 1, p. 11]. This action was repeated on July 20, 1951 [Govt's Ex. 1, p. 11].

During the trial the attention of the Court was directed to page 49 of Government's Exhibit 1, which is the Minutes of the defendant's personal appearance before the Board on January 8, 1951.

In addition to this, the defendant's witness, Fred M. Lewis, who was a member of the Selective Service Appeal Board that classified and reconsidered the classification of the defendant, testified that at the time of the hearing and at the time of considering the defendant's application the Local Board reviewed everything that was in the file [pp. 14, 15, 16] and that at the time of the personal appearance they reviewed everything new in the file [p. 16], and this testimony is corroborated by the testimony of the defense witness Fred A. Wells, another member of the Board [Rep. Tr. p. 23].

In addition to this, the attention of the Court was directed towards the report of the Hearing Officer, appearing at pages 56 to 62 of Government's Exhibit 1.

The defendant testified that his recollection of the proceedings before the Hearing Officer was different in certain details from the statement of the facts contained in the Hearing Officer's Report. The statement of facts of the Hearing Officer being in evidence on pages 58 to 61 of Government's Exhibit 1. Motions to acquit made at the conclusion of Government's case and at the conclusion of all the testimony were denied.

ARGUMENT.

Summary.

1. The evidence in the record discloses that the appellant was classified on the record in the Selective Service file relevant to the question of his *own* religious training and belief.

2. The record in the case does not disclose that the Advisory Report of the Hearing Officer was either factually incorrect, or based on any considerations except matters relevant to the question of the appellant's *own* religious training and belief.

1. The Evidence in the Record Discloses That the Appellant Was Classified on the Record in the Selective Service File Relevant to the Question of His Own Religious Training and Belief.

The Government acquiesces in the proposition that the classification must be based on facts; that the facts used must be pertinent and must conform to established standards of fairness; and that the facts must be facts applicable to the question of the registrant's *own* religious training and belief.

There is nothing in the record to show that the Local Board based its classification in whole or in part on the question of the religion of the appellant's parents, or upon the fact that the Presbyterian and Seventh Day Adventist Churches do not adhere to conscientious objection to war as a part of their religious principles.

The questions asked of the appellant and his answers as summarized in the minutes of the Hearing [Govt's Ex. 1, p. 49] were pertinent to the questions presented

to the Board, particularly in light of the answers to the questions in the appellant's conscientious objector's form.

In this connection, it is noted that he did not answer whether or not he believed in a Supreme Being [Govt's Ex. 1, p. 4]. That he stated that no religious leaders guided him to his conclusion [Ex. 1, p. 15], and that he stated that he is not a member of a religious sect or organization [Ex 1, p. 16] and more particularly in light of the fact that when he first filled out his Selective Service Questionnaire he did not claim conscientious objection to war.

The testimony of the defense witnesses indicates clearly that at the time of the classification and at the time of the personal appearance of the appellant, the Selective Service Board considered *all* of the evidence which was before it.

The fact which is not a matter of record in this case, stated at page 60 (App. Br.), that certain Roman Catholics were classified as conscientious objectors in World War II would not be material if it were part of the record in this case since the appellant does not claim that he is a Catholic, or that his alleged conscientious objection to war arises from his training as a Catholic, and the same situation prevails as to the Presbyterian and Seventh Day Adventist Churches.

Niznik v. United States, 184 F. 2d 973, has no application to this case, since the appellant was not classified upon the basis of any group affiliation but upon the facts peculiarly applicable to him.

The statement made at line 20, page 8 of Appellant's Brief, that the Board Members did not "explain * * *

No. 13405

In the United States Court of Appeals

for the Ninth Circuit.

THERON LEROY ELDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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In the
United States
Court of Appeals
for the Ninth Circuit.

THERON LEROY ELDER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13405

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF CASE

Appellant was indicted on April 2, 1952 under U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948, for refusing to submit to induction.

Appellant was convicted by a jury, Judge Ben Harrison presiding, on May 14, 1952; he was sentenced by said judge to a 3-year term of imprisonment on May 26, 1952 and is now in the Tucson, Arizona, Prison Camp.

In the court below as well as before the Selective Service agencies, appellant claimed to be a conscientious objector to all military activities and that he was entitled to a classification as such.

The Selective Service System initially classified him in Class I-A-O,[1] mailing him notification of this action on August 30, 1950. Within the 10 days provided by the regulations the registrant ambiguously asked for a personal appearance hearing. [This letter is part of Exhibit 1[2]]. The local board considered this request a Notice of Appeal as is shown by its records and by the testimony of its clerk and, therefore, it did not give him a personal appearance hearing [R. p. 19]. On the other hand, neither did it send the file to the Appeal Board, although the regulations mandatorily require that the file be sent " . . . immediately . . . but in no event later than five days after the appeal is taken."[3] The regulations mandatorily require the registrant be given a personal appearance hearing " . . . if he files a written request there-

[1]This classification is for registrants found to be sincere conscientious objectors who do not object to participation in non-combatant military service: 32 C. F. R. 1622.11 (a).

[2]The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1.

[3]32 C. F. R. 1626.13.

fore within 10 days after the local board has mailed a Notice of Classification . . . "[4]; instead, appellant's local board "reviewed the entire folder of the case and reclassified him I-A-O" [R. p. 19]. Thereafter, and within 10 days, the appellant made another (and very similar) written request for a personal interview; again he was not invited to meet the board and discuss his facts but this time the file was sent to the Appeal Board [R. p. 19]. The Appeal Board made its decision on June 27, 1951; thereafter, the Government Appeal Agent called the attention of the local board, by letter dated July 26, 1951 [this letter is part of Exhibit 1] that appellant had never had " . . . an opportunity to personally state his case before your Board . . . " so the local board invited him to appear before it on August 23, 1951. Appellant left his work with the American Friends Service Committee in Mexico and met with the local board on the appointed date; the board refused to do anything; in fact, before admitting him to their presence he was required to sign a typewritten "Waiver of Rights of Reopening of Case."

During the trial appellant attempted to raise a question of fact for the jury on the point of whether he had asked for a personal appearance before the local board [R. pp. 39-41, 45-46]; appellant's requested instruction No. 13 on this point was also rejected [R. p. 51]. Appellant was also rebuffed on the alternate

[4] 32 C. F. R. 1624.1 (a).

theory that this point, regarded as a legal question, should have been declared a denial of due process by the trial court [R. pp. 40-41].

During the trial appellant attempted to introduce evidence to show that the Advisory Opinion of the Department of Justice Hearing Officer [used by the Department and by the Appeal Board in the determination of the appeal classification] was so factually incorrect that it was sufficiently prejudicial to constitute, in itself, a denial of due process; the court below refused to admit such evidence [R. pp. 45, 48]. Appellant's requested instruction No. 14 on this point was also rejected [R. p. 51].

Appellant also attempted to show that no notice of appellant's reclassification had been sent his dependent mother [R. pp. 41, 42, 45] as required by the regulations.[5]

---

[5] 32 C. F. R. 1623.4 (b).

QUESTIONS PRESENTED

1. Whether a clumsy request for a personal appearance hearing is to be literally or liberally construed. Stated differently, where an appellant made a timely, written request for a "personal appearance hearing before the appeal board" and, as the local board well knew, there is no such thing as a personal appearance before an appeal board; and where the local board eventually sent this file on as an *appeal* to the appeal board is the hearing the local board belatedly gave him (after the appeal board made its decision) the kind of personal appearance hearing contemplated by the regulations.

2. Whether in a trial for failure to submit to induction a defendant may present evidence that the Advisory Opinion of the Hearing Officer to the Department of Justice [and used by it and by the appeal board in determining the registrant's classification] was so factually incorrect and so prejudicial that it constituted a denial of due process; and whether it is a further denial of due process for a Hearing Officer to fail to disclose before or during the hearing, when requested by the registrant, adverse material which was later used by him in his Advisory Opinion.

3. Whether a denial of due process exists where the local board does not notify the registrant's mother after the registrant is reclassified, evidence of her dependent status having been submitted by her and being present in the file.

SPECIFICATION OF ERRORS

1. The District Court erred in not concluding that appellant had made a timely written request for a Personal Appearance Hearing before the local board and that he had been denied due process when, instead of a personal appearance hearing, he was given an appeal [R. pp. 19, 41]; the District Court erred in not giving appellant's proposed jury instruction No. 13 on this subject [R. p. 51]; the District Court erred in refusing to admit evidence on this point and in not submitting the issue to the jury:

> "MR. TIETZ: We would save time, if the court means by that, as I think the court does mean, that the court will not permit any evidence to come in to show any of these claimed denials of due process.
>
> "THE COURT: Yes, I am holding that. I am holding, in effect, it is a question of law for the court to pass upon" [R. p. 45].

2. The District Court erred in refusing to admit testimony that the Hearing Officer forwarded, for the consideration of the Department of Justice and the Appeal Board an incomplete and incorrect report of the Hearing conducted by him; further, that he did not inform the appellant either before or during the Hearing that he had information from the F.B.I. adverse to the appellant's claim; in fact, he did state to appellant that there were no adverse statements in your case, but I have a couple of questions to ask you;

that the Hearing Officer subsequently used adverse hearsay information in his Advisory Opinion without having given registrant any opportunity to explain or rebut it [R. p. 45]; that the court erred in refusing to submit the issue to the jury and in refusing to give appellant's proposed jury instruction Nos. 10 and 14 on the subject [R. p. 51].

3. The District Court erred in not concluding that the appellant's mother had notified the local board in writing of her dependency. The Court further erred in not concluding appellant had been denied due process when the local board failed to send the mother a Classification Notice, thus depriving her of the opportunity to appeal independently of appellant; the Court erred in not submitting the issue to the jury.

ARGUMENT

I.

A CLUMSY, BUT TIMELY, WRITTEN REQUEST BY A SELECTIVE SERVICE REGISTRANT, FOR THE PERSONAL APPEARANCE PROVIDED BY THE REGULATIONS AFTER CLASSIFICATION IS TO BE LIBERALLY CONSTRUED AND A DENIAL OF SUCH A REQUEST IS A DENIAL OF DUE PROCESS.

Notice of Classification (SSS Form No. 110) is a standard size government post card; the following Notice of Right to Appeal, in very small type appears on the left one-fourth of this card [to show the precise size of the type it is reproduced in it, as well as in the size required by Rule 21]:

> Appeal from classification by local board must be made within 10 days after the mailing of this notice by filing a written notice of appeal with the local board.
>
> Within the same 10-day period you may file a written request for personal

appearance before the local
board. If this is done, the
time in which you may
appeal is extended to 10
days from the date of
mailing of a new Notice
of Classification after such
personal appearance.

If an appeal has been
taken and you are classi-
fied by the appeal board in
either Class I-A or Class
I-A-O and one or more
members of the appeal
board dissented from such
classification you may file
a written notice of appeal
to the President with your
local board within 10 days
after the mailing of this
notice.

It is obviously desirable for a disappointed registrant who sincerely believes himself misunderstood to

avail himself of the opportunity to appear personally before the local board. In fact, this is his only opportunity to do so for, at all other times, he speaks only to the clerks.

As was said by the third circuit in *United States vs. Stiles,* 169 F. 2d 455, 458:

> "Upon reading these provisions we see at once from paragraph (b) that the purpose of the personal appearance is not solely to present the local board with new information. It is also to enable the registrant to discuss his classification with members of the board on the basis of the information already in his file and to make an oral argument that the information already furnished, when given proper weight, calls for a different classification. The right to have such an opportunity to talk over and explain his case to members of the board is obviously of the greatest value to a registrant even though he has no new information to present and this right the regulation guarantees."

It is quite obvious from the Notice of Right to Appeal, there is no mention of any right to a personal appearance before the *Appeal Board.* In fact, there is no such right, or even possibility. Counsel for appellant, in an endeavor to understand Appeal Board processing has persistently tried to secure permission to audit one such session, to verify, among other things the information given him that the Appeal Board now processes only 50 cases an hour whereas it processed

80 an hour in W.W.II. Permission was denied by every official, including the California State Director.

We submit it is only fair to conclude a registrant asking for a personal appearance, within the 10 days of the Notice is responding to the notice and is asking for what it offers. If he, through inadvertence, or any other reason, uses a strange or ambiguous formula of words we believe a reasonable effort should be made by the local board to ascertain his meaning and intention.

As was said by this court in *Cox vs. Wedemyer,* 192 F. 2d 920, 922-923:

> " . . . the procedure established under the Selective Service Act of 1940 was designed to fit the needs of registrants unskilled in legal procedure, many of whom, too, were wholly or partially illiterate, and none of them represented by counsel."

Appellant submits his situation is parallel. The ambiguity of his request [for a "personal appearance hearing before the appeal board"] is certainly due in part to the wording of the Notice of Right to Appeal. The emphasis in this notice on "appeal" and its repetition of the word "appeal" could well be expected to confuse the average youngster. Since a registrant has a further 10-day period for an appeal *after* a personal appearance hearing any doubt should have been resolved in favor of giving appellant the personal appearance just as this court in *Cox's* case decided the

Appeal Board should have reclassified Cox *de novo,* and not partially.

In a recent case it appeared that the local board had given the registrant a personal appearance hearing before it classified him and, when he asked for another after he was classified the local board refused on the basis he had had a personal appearance hearing. The trial court observed, on page 598:

> "The Government stresses the uncontested fact that defendant had a hearing at the local board prior to the first classification. There was introduced in evidence a memorandum of this appearance, and it was initialled by three members of the board."

and on page 600 the court concluded

> "There is nothing in the Selective Service Regulations which bars the local board from holding a pre-classification hearing such as that in the instant case. No doubt hearings of this kind may be of some assistance to the board in drawing its conclusion as to what classification the registrant should be given. But this is not to say that a hearing at that time fulfills the requirements of Part 1624. The Regulation is met only when the registrant is afforded the opportunity to appear before the board after he has been classified."

United States v. Romano, 103 F. Supp. 597.

The fact that the local board in the instant case gave appellant a personal appearance hearing on

August 23, 1951 (a year after his request and after his appeal was decided) does not alter the denial of due process for the following reasons: first, he was required, before entering the board's presence, to waive his appellate rights; next, an appeal based on a personal appearance hearing is more valuable than one not so based for the regulations require the local board to place a written summary of what took place at the hearing in the registrant's file.

The present problem is very similar to the one considered by the third circuit in *United States v. Zieber,* 161 F. 2d 90. The following excerpt shows the court's disposition of an ambiguous request:

> "It is apparent from the testimony of the Clerk and that of the chairman that whether the Board listened to Zieber for 45 minutes or for only 4 or 5 minutes, it did not consider his testimony in determining his classification because the members were of the opinion that he had appealed his case when he filed with the Board the 'Written Argument,' hereinbefore referred to. If the filing of this document was in fact deemed by the Board to constitute an appeal (as seems to have been the case) it is difficult to see why Zieber's request for a personal appearance should have been granted by the Board on August 24 or why he should have been heard at all on August 27. But nothing contained in the 'Written Argument' requests an appeal or makes any reference to an appeal. The Board was not entitled to treat it as an appeal . . . " [92].

Any doubt concerning a registrant's meaning should be resolved in his favor. In *United States v. Hufford,* 103 F. Supp. 859, the court said

> "Whether or not the Board members intended to treat the registrant's letter as a notice of appeal is open to question, but the fact remains that the local board's own record shows a notice of appeal having been filed within the 10-day period. In view of the fact that Regulation 1626.11 provides that any notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal, any doubt should be resolved in favor of the registrant. That there is such a doubt in this case cannot be disputed." [862].

Another reason for a measure of liberality towards registrants was given by Attorney-General McGranary in his last reported decision as a District Judge, *Ex Parte Fabiani,* 105 F. Supp. 139:

> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." [146-7].

Appellant never asked for an *appeal.* He asked for a personal appearance. Since the local board knew appellant could not talk to the Appeal Board it had no

excuse for denying him the requested personal appearance and giving him the unsought appeal. Since the local board knew appellant never had a personal appearance before it; and since it knew the personal appearance with the local board was the next step in the Selective Service procedure the board should have given him the requested appearance *when* he asked for it. At the worst construction of the evidence whether appellant asked for a personal appearance before the local board was a question of fact for the jury. Since point number II embraces such an argument the Court is referred to it.

II.

THE FAILURE OF THE DEPARTMENT OF JUSTICE HEARING OFFICER TO DISCLOSE TO A REGISTRANT, UPON REQUEST, ADVERSE MATERIAL IN HIS POSSESSION IS A DENIAL OF DUE PROCESS IF HE USES THIS MATERIAL IN HIS ADVISORY OPINION. IT IS A FURTHER DENIAL OF DUE PROCESS IF THE ADVISORY OPINION DOES NOT CORRECTLY REFLECT WHAT TRANSPIRED AT THE HEARING.

The extreme importance of the Advisory Opinion in the appellate process demands that appellant's due process rights connected with it be safeguarded. In the Advisory Opinion the Hearing Officer recites the gist of both the exhaustive F.B.I. investigation and of

his interview with the appealing registrant. The Attorney General's instructions require that the Hearing Officer " . . . advise the registrant as to the general nature and character of any evidence in his position which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence."

Appellant believes that due process requires that he be permitted to introduce evidence on such matters and that these matters *were questions for the jury.* Appellant's proposed instructions Nos. 10 and 14 were before the court at all times and the court's rejection of evidence on this subject [R. p. 44] was made with knowledge of appellant's expected testimony and the said proposed instructions are to be considered as a proffer, together with appellant's efforts to testify on this particular point [R. p. 45].

The *Zieber* decision (supra) also makes clear that such questions of fact are for the jury:

> "Whether a selectee has or has not been afforded due process of law by the Selective Service agencies, there being disputed fundamental questions of fact as in the case at bar, should have been determined by the jury under proper instructions from the court."

Also see *Niznik v. United States,* 173 F. 2d 328.

Although this is a matter of first impression, a related denial of due process was denounced by Judge

Learned Hand in *United States v. Balogh,* 157 F. 2d 939:

> "As the case comes to us, the board made use of evidence of which Balogh may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing." [943]

III.

THE FAILURE OF THE LOCAL BOARD TO NOTIFY THE MOTHER OF THE RECLASSIFICATION WAS A DENIAL OF DUE PROCESS.

The selective service regulations [§1626.2 (a)] provide that a registrant's dependent may independently appeal a decision adverse to the registrant's claims. To implement this right it is required that the local board send notice of classification to the dependent [§1623.4 (b)]. The applicable portion of this subsection (b) reads:

> "(b) As soon as practicable after the local board has classified or reclassified a registrant into any class other than V-A, it shall mail a notice thereof on a Classification Advice (SSS Form No. 111) to every person who has on file any written request for the current deferment of the registrant."

The question present, of course, is whether appellant's mother had "on file a written request for the current deferment of the registrant." Appellant contends he should have been permitted to introduce evi-

dence on this point and should not have been foreclosed [R. pp. 42-45] and that the question should have gone to the jury. The trial court chose to decide this factual question by announcing the dependency letter was no more than a request appellant be permitted to be the mother's chauffeur [R. p. 43] although the letter clearly points out her *dependency.* [R. pp. 42-43].

Here again we have a question paralleling that raised in the *Cox* case (supra). Is this mother required to use the word "dependent?" Put another way and somewhat paraphrasing this court's thought in its *Cox* decision]: must a registrant and his mother be Philadelphia lawyers? The court resolved Cox's ambiguity in favor of the appellant and this appellant believes he too is entitled to this relief.

Finally, shouldn't this appellant have at least a Chinaman's chance when he needs the benefit of the doubt? The First Circuit reversed a conviction in the case of *Chih Chung Tung v. United States,* 142 F. 2d 919, because appellant had not been given the benefit of the doubt. Chih wrote to his local board "I appeal again not to be drafted . . . " and the appellate court decision noted that "The local board did not treat this letter as an appeal . . . " [both quotations from p. 920] and went on to say:

> "The letter is informal but it gave the registrant's name so as to show his right to appeal, and it expressed unmistakably the registrant's dissatisfaction with the action of the local board

classifying him in I-A. Furthermore, it gave reasons for that dissatisfaction. To be sure it does not refer to the board of appeal or expressly invoke the aid of that body, but it does use the words 'I appeal.' Considering the letter as a whole against the background provided by the papers on file with the local board, we think it would be taking a narrow and technical view wholly at variance with the spirit of the Act and the Regulations to regard the letter as anything but an appeal." [quoted from p. 921].

Respectfully submitted,

J. B. TIETZ,
Attorney for Appellant.

No. 13405

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THERON LEROY ELDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLEE.

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No. 13405

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THERON LEROY ELDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on April 2, 1952, under Section 462 of Title 50, App., United States Code. [R.[1] pp. 3-4.]

On April 21, 1952, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on May 14, 1952.

On May 14, 1952, appellant was tried in the United States District Court for the Southern District of California, before a jury, and was found guilty as charged in the Indictment. [R. p. 4.]

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[1]"R." refers to Transcript of Record.

On May 26, 1952, appellant was sentenced to imprisonment for a period of three years, and judgment was so entered. Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.
Statutes Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section], . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, . . ."

III.
Statement of the Case.

The Indictment charges as follows:

INDICTMENT.

(U. S. C., Title 50, App., Sec. 462—
Selective Service Act, 1948)

The Grand Jury charges:

Defendant Theron Leroy Elder, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 88, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on February 12, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do. [R. pp. 3-4.]

On April 21, 1952, appellant appeared for arraignment and plea, represented by J. B. Tietz, Esq., before the Honorable Ben Harrison, United States District Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On May 14, 1952, the case was called for trial before the Honorable Ben Harrison, United States District Judge, with a jury, and on May 14, 1952, the jury found the appellant guilty as charged in the Indictment. [R. p. 4.]

On May 26, 1952, appellant was sentenced to imprisonment for a period of three years in a penitentiary. [R. pp. 5-6.]

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in not concluding that appellant had made a timely written request for a personal appearance hearing before the local board and that he had been denied due process when, instead of a personal appearance hearing, he was given an appeal; the District Court erred in not giving appellant's proposed jury instruction No. 13 on that subject; the District Court erred in refusing to admit evidence on this point and in not submitting the issue to the jury. (App. Spec. of Error 1—App. Br. p. 6.)[2]

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

B—The District Court erred in refusing to admit testimony that the Hearing Officer forwarded, for the consideration of the Department of Justice, and the Appeal Board, an incomplete report of the Hearing conducted by him; further, that he did not inform the appellant, either before or during the Hearing, that he had information from the F. B. I. adverse to the appellant's claim, in fact, he did state to appellant that there were no adverse statements in his case, but that he did have a couple of questions to ask of appellant; that the Hearing Officer subsequently used adverse hearsay information in his Advisory Opinion without having given appellant any opportunity to explain or rebut it; that the Court erred in refusing to submit the issue to the jury and in refusing to give appellant's proposed jury instructions Nos. 10 and 14 on the subject. (App. Spec. of Error 2—App. Br. pp. 6-7.)

C—The District Court erred in not concluding that the appellant's mother had notified the local board in writing of her dependency. The Court further erred in not concluding appellant had been denied due process when the local board failed to send the mother a Classification Notice, thus depriving her of the opportunity to appeal independently of appellant; the Court erred in not submitting the issue to the jury.

IV.

Statement of Facts.

On September 14, 1948, Theron Leroy Elder registered with Local Board No. 88, Pasadena, California. He was eighteen years of age at the time, having been born on January 9, 1930. He gave his occupation as "Student."

On May 6, 1949, Theron Leroy Elder filed with Local Board No. 88, SSS Form 100, Classification Questionnaire, and by letter attached to the questionnaire he informed Local Board No. 88 that he was a conscientious objector and asked for further information and forms.

SSS Form 150, Special Form for Conscientious Objector, was furnished Elder and he completed this form and filed it with Local Board No. 88. Elder claimed to be a conscientious objector because of his religious training and belief. He was classified 1-A-0 on August 29, 1950, and was mailed SSS Form 110, Notice of Classification.

On August 23, 1950, Local Board No. 88 received a request for consideration of certain facts as a possible deferment of Theron Leroy Elder from his mother, Mrs. Juanita Elder. [R. pp. 42-43.] The facts given by Mrs. Elder in her request were:

> "If Roy was home with me he could take me to White Memorial Clinic . . . I do have a daughter—she don't drive the car. Roy could pick up the groceries with the car—also fix the car when it needs it. Would this situation be considered?"

On September 9, 1950, Elder requested "a personal appearance before the appeal board." This request was made upon the ground that he was conscientiously opposed

to both combatant and non-combatant training or service in the armed forces. The local board treated this request as an appeal and forwarded Elder's Selective Service file to the Appeal Board on January 12, 1951.

On January 22, 1951, the Appeal Board reviewed Elder's Selective Service file and determined that he was not entitled to classification in either a class lower than IV-E or in Class IV-E, and forwarded the file to the Department of Justice. A hearing was held by the Department of Justice Hearing Officer on May 22, 1951. The Hearing Officer recommended that Elder should not be given either a 1-A-0 or IV-E classification.

On June 25, 1951, the Appeal Board reclassified Elder 1-A by a vote of 3-0 and he was mailed SSS Form 110, Notice of Classification.

On August 23, 1951, Elder was given a personal appearance before the local board to consider the merits of reopening his case. In this hearing he was required to sign a waiver of rights of reopening his case. Pursuant to such hearing and review of Elder's Selective Service file, the case was determined to be not subject to reopening by the local board. Notice that his case was not to be reopened was mailed to Elder, and a carbon copy of such notice was mailed to Mrs. Juanita Peterson, mother of Theron Leroy Elder.

On January 24, 1952, SSS Form 252, Notice to Report for Induction, was mailed to Elder, ordering him to report for induction into the armed forces of the United States on February 12, 1952, at Los Angeles, California.

On February 12, 1952, Elder reported for induction but refused to submit to induction into the armed forces of the United States.

V.
Argument.

A. Replying to appellant's Assignment of Error (Spec. of Error 1, App. Br. p. 6), the Government contends that there was no denial of due process of law in treating appellant's request for "a personal appearance before the Appeal Board" as an appeal rather than a request for personal hearing before the local board.

The Selective Service Regulations, Section 1624.1, provides in its pertinent part:

> "1624.1. Opportunity to Appear in Person.—(a) Every registrant, after his classification is determined by the local board . . ., shall have an opportunity to appear in person before the . . . local board . . . if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 10-day period may not be extended."

This regulation sets out in clear language the requirements necessary to establish a right to a personal appearance before the local board. The requirements are again repeated on the Notice of Classification (SSS Form 110), sent to a registrant following his classification by the local board. (App. Br. pp. 8-9.) These requirements are set forth in clear and precise language and create no ambiguity which might mislead a registrant in the prosecution of any rights granted him under the Selective Service Regulations.

The argument of counsel for the appellant resolves itself merely to the question of interpretation of the request made by the appellant to the local board. This was a request for "a personal appearance before the Appeal Board." In construing this request, the local

board determined it was an appeal, and not a request for a personal appearance before the local board. This particular issue, it is submitted, is squarely within the ruling of *Cox v. United States,* 332 U. S. 442.

Cox v. United States, 332 U. S. 442, provides the limits of judicial review of the actions of administrative boards under the Selective Service Act. These limitations as defined by the *Cox* case (*supra*) confine judicial review to the question of whether or not the action of the local board in classification of a registrant was "arbitrary and capricious." The Court in the *Cox* case says, at page 448:

> "The scope of review to which petitioners are entitled, however, is limited; as we said in Estep v. United States, 327 U. S. 114, 122-3: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classifications made by the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.' "

Further, at page 453, the Court says:

> "When the judge determines that there was a basis in fact to support classification, the issue *need not and should not* be submitted to the jury . . . Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration." (Emphasis added.)

The local board having determined the request to be an appeal and the finding by the trial court that the action of the local board was neither arbitrary nor capricious [R. p. 38], there was no error in refusing to give appellant's proposed jury instruction No. 13 or in refusing to admit evidence on this point and submit the issue to the jury.

B. Replying to appellant's next Assignment of Error (Spec. of Error 2, App. Br. pp. 6-7), the Government contends that the second part of appellant's Specification of Error is not properly before this Court. The Government further contends that there was no denial of due process of law in refusing to submit to the jury any question concerning the advisory opinion of the Hearing Officer to the Appeal Board.

It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court. (*Becker Steel Co. of America v. Cummings,* 296 U. S. 74; *Ex parte Kamiyama,* 44 F. 2d 503; 4 C. J. S. 430, Sec. 228.)

Insofar as the transcript of record in the present appeal raises no question of the failure of the Hearing Officer to disclose adverse material to the appellant or that the appellant made any such request, this question is not properly before this Court.

Appellant's further assignment of error relates to the failure of the trial court to submit the question of the incompleteness and incorrectness of the report of the Hearing Officer to the jury.

Cox v. United States, 332 U. S. 442, defines the limitations placed upon reviewing courts in their review of the

administrative proceedings before the Selective Service Board. At page 454, the Court says:

> "It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted. As we have said elsewhere the board records were made by petitioners. It was open to them to furnish full information as to their activities. *It is that record* upon which the board acted and upon which the registrant's violation of orders must be predicated." (Emphasis added.)

The trial court in the present case found that there existed basis in fact for the classification of the appellant. [R. pp. 29, 38.] Having made such a finding, the Court properly withheld from the jury any question as to the validity of the classification given the appellant. (*United States v. Fry,* 103 Fed. Supp. 905.) Consequently, refusal by the trial court to give appellant's requested instruction No. 14 and refusal to submit the issue to the jury was proper.

The appellant also assigns as error the failure of the trial court to give appellant's proposed jury instruction No. 10. The Transcript of Record discloses that exception was taken by the appellant only to the failure on the part of the trial court to give appellant's proposed jury instructions Nos. 13 and 14. [R. p. 51.] Rule 30 of the Federal Rules of Criminal Procedure provides in its pertinent part:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, . . ."

No timely objection having been made to the trial court's failure to give appellant's instruction No. 10 pursuant to Rule 30, such question is not properly before this Court for review.

C. Replying to appellant's next Assignment of Error (Spec. of Error 3, App. Br. p. 7), the Government contends that there was no denial of due process of law in the failure of the local board to notify the appellant's mother concerning any classification made of the appellant by the Selective Service Board.

The Selective Service Regulations, Section 1626.2, provides in its pertinent part:

> "1626.2. Appeal by Registrant and Others—(a) . . . any person who claims to be a dependent of the registrant . . . may appeal."

Some question is raised by the appellant as to the interpretation of the letter written by Mrs. Juanita Elder, the appellant's mother, to the local board. [R. pp. 42-43.] Appellant claims the local board should have interpreted this as a request for a dependency deferment. In this regard the definition of "dependent" is important. The Selective Service Regulation, Section 1622.30, provides in its pertinent part:

> "1622.30 Class III-A
>
> (a) . . .
>
> (b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother or sister who is *dependent upon him for support* . . ." (Emphasis added).

No showing of extreme hardship or privation by one who is dependent for support upon the appellant is made in the letter written by Mrs. Elder. This is, as the trial court puts it, a request for appellant's deferment "so he can act as a chauffeur." [R. p. 43.]

Assuming, however, that the letter written by Mrs. Elder could be construed as a request for a dependency deferment, the Government contends that the appellant was not denied due process of law by failure of the local board to notify Mrs. Elder of the classification given the appellant.

It is fundamental that due process of law is afforded a person when he is given notice and an opportunity to be heard. There is no evidence that the failure to send the required notice to Mrs. Elder deprived the appellant of any right or injured him at any stage of his appeal. Appellant was afforded an appeal. At that time he had an opportunity to support any claim of dependency that he might have had. This the appellant failed to do. As stated by the Court in *United States v. Fry,* 103 Fed. Supp. 905, at pages 909-910:

> "The court must look to substance rather than to form. The registrant was not injured in any respect by failure to receive this notice."

Further, the question raised by the appellant again falls within the limitation of *Cox v. United States,* 332 U. S. 442. The local board having construed Mrs. Elder's letter as a mere request for consideration of the matters contained therein, and the trial court having found that such action was neither arbitrary nor capricious

[R. p. 38], such decision of the local board was "final" within the meaning of the *Cox* case, *supra,* and properly withheld from consideration by the jury.

VI.

Conclusion.

The questions raised in this appeal fall within the limitations on judicial review of Selective Service Board action as stated in *Cox v. United States,* 332 U. S. 442. The trial court finding there was no arbitrary or capricious action by the local board, the only questions for submission to the jury were whether the appellant was ordered to induction and whether the appellant refused to submit to induction as ordered. These two questions the trial judge submitted to the jury. All other questions were properly withheld from the consideration of the jury.

There was no error of law in the rulings of the trial court and the conviction should be affirmed.

Respectfully submitted,

WALTER S. BINNS,
United States Attorney,

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 13405

In the United States Court of Appeals

For the Ninth Circuit

THERON LEROY ELDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Petition for Rehearing

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United States Court of Appeals
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THERON LEROY ELDER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 13405

Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of the judgment entered by the Court on February 24, 1953, affirming the judgment of the Court below, and for grounds thereof respectfully represents that:

1. This Court, in this case, concluded it could not agree with the Second Circuit (*United States v. Nugent,* 2d Cir. 200 F. 2d 46), wherein the Second Circuit held that the F.B.I. investigative report should have been placed in the registrant's (appellant's) selective service file, and that its absence vitiated the subsequent selective service classification.

2. The Second Circuit followed its *Nugent* decision in deciding *Packer v. United States,* 200 F. 2d 540.

3. The Third Circuit decided not to require reargument in *Borisuk v. United States,* ..... F. 2d ....., unless and until the Supreme Court decided not to grant certiorari in *Nugent* and *Packer.*

4. The Supreme Court of the United States granted certiorari in *United States v. Nugent,* Number 540, and *United States v. Packer,* Number 573, on March 16, 1953, and these cases have been assigned to the summary docket.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, that the Court defer ruling on this Petition until the Supreme Court decides the *Nugent* and *Packer* cases, and that the mandate of this Court be stayed pending the disposition of this Petition.

J. B. TIETZ,
Attorney for Appellant.

CERTIFICATE

Counsel further represents and certifies:

1. Appellant is presently in Tucson Federal Prison serving the term of imprisonment imposed;

2. In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ,
Attorney for Appellant.